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IN THE

SUPREME COURT

OF THE

STATE OF CALIFORNIA.

The People of the State of California,

Respondents,

vs.

The Gold Run Ditch and Mining Company,

Appellant.

Opening Brief for Appellant.

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By J. Winiarne *Deputy Clerk.*

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IN THE

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THE PEOPLE OF THE STATE OF CALIFORNIA,

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THE GOLD RUN DITCH AND MINING COMPANY,

Appellant.

STATEMENT OF FACTS.

Pleadings.

This is an action brought by the Attorney-General, in the name of the People of the State, to restrain defendant from working its hydraulic mine.

It is alleged that the navigation of the Sacramento river has been seriously impaired by tailings from hydraulic mines; that hydraulic mining is principally practiced in the counties of Butte, Yuba, Sierra, Nevada and Placer, and to some extent in other mining counties, and has been so practiced for twenty years previous to 1881.

That the valley portions of the American and Sacramento rivers are filled to a large extent with hydraulic mining tailings; that by reason of such filling, these rivers overflow their banks, and cause large deposits of debris on the adjacent lands, owned by citizens of this State, and greatly injure such lands; that the fill in the rivers also injures the drainage of Sacramento city and large districts of agricultural lands, and is also injurious to health.

The complaint further states that defendant is the owner of a hydraulic mine situate in Placer county, on the North Fork of the American river, about eighty miles from the city of Sacramento, and discharges from the mine daily 13,500 cubic yards, and annually 2,500,000 cubic yards of tailings into said river, and so fouls the waters thereof as to render them unfit for domestic use.

It is also alleged that the defendant largely and materially contributes to the filling in said rivers and the deposits upon the adjacent lands.

It is further alleged that the defendant threatens to continue the acts complained of, and that the continuation of such acts, in connection with similar acts by others, will further impair the navigation of the Sacramento river, and further injure lands of citizens of this State adjacent to said rivers.

The defendant moved to strike out from the complaint all that portion thereof which alleged injuries to private lands, and the fouling of the water of the American river so as to unfit it for domestic use, and in its motion particularly specified the portions to be stricken out as irrelevant and redundant.

The Court overruled the motion to strike out, and defendant duly excepted. (Trans. on App., folios 44 to 50, inclusive.)

The defendant then demurred to the complaint, because the Attorney-General had no authority to bring this action, and upon three other grounds, which raise substantially the same questions as are presented by the motion to strike out, and also upon the ground of the improper joinder of two several causes of action; and upon the further ground that the complaint does not state facts sufficient to constitute a cause of action.

The answer admits the ownership of the mine, and alleges that the same is held by purchase from

the locators and patent from the United States; and it is alleged in the answer that defendant and its predecessors have worked the same by the hydraulic process continuously since the year 1854, discharging the tailings therefrom into Cañon creek, a tributary of the North Fork of the American river, without protest or objection from any one, and pleads custom, prescription and also license from the United States and the State of California in justification thereof.

It is further alleged that the defendant, in the purchase and improvement of said mine, and in the construction of water ditches and the acquisition of water rights appurtenant thereto, has expended the sum of $450,000.

It is denied that the defendant discharges more than 1200 cubic yards of tailings per day, or more than 500,000 cubic yards per annum from its mine.

It is also denied that any injury to navigation, or to the drainage of Sacramento city, or the drainage of agricultural lands adjacent to said rivers, or to health, has resulted from hydraulic mining, and particularly deny that any of these results are caused by the mining operations of the defendant.

The defendant also specifically denies that it has or will largely or materially, or at all, contribute or add to the deposit of tailings in the valley

section of said rivers, or upon the adjacent lands, or upon any of the lands described in the complaint; and denies that any part of the tailings from the defendant's mine has been or will be carried down or deposited in the valley section of said rivers, or upon any of the lands described in the complaint.

Judgment.

The case was tried by the Court, Judge Temple presiding. The evidence was reduced to writing, and is contained in forty-five volumes, which, by leave of Court and stipulation of parties, is a part of the record on these appeals. The Court, after making and filing findings of fact and conclusions of law, entered the following judgment:

"It is ordered, adjudged and decreed: that said "defendant, and all the officers, superintendents, "foremen, agents and employees thereof, be per- "petually enjoined and restrained from discharg- "ing or dumping into the North Fork of the "American river, or into any stream tributary "thereto, and especially into Cañon creek, any "bowlders, cobblestones, gravel or sand from the "mines; also from causing any such material to "flow or to be washed into said river from its said "mines or tracts of mineral land. Subject, never- "theless, to this, that said defendant may, at any

"time, as it shall be advised, apply to this Court "to have this decree and restraining order modi- "fied or vacated and set aside. And whenever, "upon such showing, it shall appear that efficient "means have been provided to impound, detain "and hold back such tailings at any point on said "American river above Alder creek, and that such "means are sufficient to detain all bowlders, cob- "blestones, gravel and the heavier sand, then said "defendant shall be entitled to have said decree "vacated and set aside."

Defendant appealed from that part of the judgment granting an injunction. Plaintiff appealed from the remainder of said judgment.

Findings.

The findings contain many historical facts and matters which we do not propose to review.

The findings which present the questions we shall discuss are as follows (the italics being ours):

Fol. 183. "THE AMERICAN RIVER. * * * As early as "1852, there were mining in the American river, "in Placer county, 20,000 men, and in El Dorado "county, 40,000. The earlier mining was in the "bars and the beds of the river or its tributaries, "or in the dry diggings, which were probably "older bars made in former geologic periods. "The work was chiefly in mining the gravel and

"sand, composing the river bars into the river,
"generally leaving the heavier cobbles in the
"claims.

Fol. 184. "The so-called dry diggings were worked dur-
"ing high water. Much of the material being
"light soil, was sent down the stream, leaving
"innumerable small pits and piles of débris on the
"slopes of the mountains.

"In the winter of 1852 and 1853 there was a
"large flood, but from that time until the winter
"of 1861 and 1862—the memorable flood year—
"there was no flood of moment. Of course at this
"time an enormous amount of material would
"naturally be exposed to the transporting power
"of such deluge, and accordingly we find that *for*
"*the first time* the inhabitants of the valleys be-
"came aware that the water was filled with sedi-
"ment which menaced the navigability of the

Fol. 185. "rivers, and which left large deposits of sand upon
"their margins. *It is probable that more sediment*
"*was brought down by the river during that year*
"*than any year since.* * * * *
"* * * * * * *

Fol. 177. "Ancient gravel channels exist, at least 200 miles
"in extent, from Mariposa county to Siskiyou,
"crossing the present river system diagonally, and
"at higher altitude. These channels are from 200
"to 2000 feet wide, and contain gravel; sometimes
"several hundred feet deep. Gold is distributed

"quite uniformly throughout the length of the "channels. The first mining was generally in the "present rivers, below where they had washed "out the old channels.

"Competent persons estimate the entire product "of gold from California mines at $1,154,689,039, "up to June, 1881, $900,000,000 *being from the "ancient channels.* The present yield varies be- "tween fifteen and twenty millions per annum, "*and there is, no doubt, much more gold still re- "maining in these ancient channels than has been "washed out.*

Fol. 178. "Present investments in California gold mines "are estimated at $150,000,000, $100,000,000 of "which is in hydraulic mines. Some portions of "this is, no doubt, in mines which cannot be "profitably worked.

"Mining for gold is the principal industry in "fifteen counties of the State, and the population "of mining counties is over one hundred "thousand. * * * * * *

Fol. 170. "The mine of defendant is about 83 miles, by "the river, above Sacramento, and is a blue gravel "mine, and constitutes a portion of the ancient "river channels which cross the present river sys- "tem diagonally.

Fol. 173. "* * * It has been a custom almost uni- "versally acquiesced in, in the mining communities "of this State, to regard the streams as common

"ways for the discharge of mining detritus, the
"exceptions being where such streams have been
"previously occupied by some works, such as a
Fol. 174. "ditch to convey water. Such right on the part
"of the mine owners is, in most cases, *essential to*
"*the economical working of the mines.* Such
"practice is necessarily confined to the mining
"localities, and has not been recognized or acqui-
"esced in elsewhere, *except that the water of the*
"*streams, throughout their entire course, have been*
"*rendered turbid and foul without complaint,*
"*until within the past few years.*

"That neither this State nor the United States
"has licensed the defendant, or any mine, to dump
"his tailings into the streams, so as to be trans-
Fol. 175. "ported into any navigable river, stream or bay,
"nor has this State legalized the same. Nor have
"the Sacramento or American rivers been dedi-
"cated to the use of miners as a place of deposit,
"or for a way to transport mining material, nor is
"either cause of action set forth in the complaint,
"barred by the provisions of section 315, 338 or
"343 of the Code of Civil Procedure of this State,
"or of either or any of said sections.

Fol. 150. "The Sacramento is navigable, and has been
"continuously navigated by steamers, barges,
"schooners and smaller craft, and up to 1862, was
"navigated as far as the city of Sacramento, without
"difficulty, by steamers of deep draft, to wit: by

"boats drawing nine or ten feet of water. That
"said river has been declared navigable by law to
"the mouth of Middle creek, which is above the
"confluence of American and Sacramento. That
"since 1862, the navigation of said river has
"been seriously impaired by deposits of mud
Fol. 151. "and sand therein, which have in part come from
"hydraulic mines, so that now the city of Sacra-
"mento can be reached by boats of deep draft
"during the high stages of the water only, instead
"of at all times, as formerly.

Fol. 154. "That the tailings and deposits from said hy-
"draulic mines, with other matter carried by the
"waters of said rivers, have filled up and raised
"the beds and channels of said Sacramento river to
"a great extent below the mouth of the American
"river, to wit, from six to twelve feet, and have
"filled up and raised the American river below
"Alder Creek, from ten to twenty feet, and in
"places even more. Such filling has been mate-
"rially increased by the tailings from the hydraulic
"mines.

Fol. 155. "Such fillings have shallowed the channels
"of the Sacramento river, and materially im-
"paired the navigation thereof, and have materi-
"ally increased the liability of the Sacramento
"river and of the American river below Alder
"creek to overflow their banks, and have caused

" the frequent floods in said rivers to be more de-
" structive than they otherwise would have been.

" That the débris from mines, including the
" mine of the defendant, has materially contrib-
" uted to such filling of the river channel, and
" thereby has interfered with and obstructed the
" free and comfortable use and enjoyment of large
" portions of the land upon the American and
" Sacramento rivers."

Fol. 156. " That the American river is, however, obstruct-
" ed by the levees and the levee system on the Sacra-
" mento, which causes the water to be dammed up
" and made to flow back into the American river, and
" over the banks thereof during the stages of high
" water in the Sacramento, and thereby large
" tracts of land are submerged and heavy deposits
" made thereon, which would not exist but for
" such levee system, or the defects in the same.

Fol. 157. " That one of the principal sources of damages
" by the overflow of lands on the Sacramento
" river is from the erosion of the bank, nearly
" opposite the mouth of the American, and the
" break in the levee at that point. That the more
" immediate cause of this erosion and break was
" the change in the course of the American river,
" which manifestly would have produced the break
" and much consequent damage although all min-
" ing operations had been suspended.

"That during the highest stages of the water
"of the Sacramento, the channel of said river is
Fol. 158. "insufficient, and even if it had not been filled up
"would have been insufficient *to carry one-half*
"*the volume of water* sent down by its various
"confluents, and at such times would break the
"present levees, *even though no mining were car-*
"*ried on.*

"Still, the mining débris does increase and ag-
"gravate all these evils, and renders the problem
"of controlling the streams and the protection of
"the valleys more difficult and expensive, and
"causes more land to be injured and the free en-
"joyment thereof interfered with than would have
"been interfered with or injured, but for such min-
"ing débris.

Fol. 159. "The defendant is, and since August, 1870, has
"been a corporation under the laws of the State
"of California, for the purpose of mining by the
"hydraulic process, and the selling of water to
"miners and others. That it is now, and for sev-
"eral years last past, it and its predecessors have
"been in possession of certain mines and mineral
"land situated adjacent to the North Fork of the
"American river, on the north side thereof, near
"the town of Gold Run in Placer county, and
"consisting of about five hundred acres of land.
"The surface of said land is about one thousand
Fol. 160. "feet above said North Fork of the American

"river. All the material of said mine is capable "of being worked off into said American river, "and consists of about twenty million cubic yards "of material composed mostly of sand, small "stones, cobbles and boulders, mixed with small "particles of gold.

"Defendant by means of ditches and iron pipes, "has conducted to its aforesaid mines a large "quantity of water, which it is using, and will "continue to use under a vertical pressure of sev-"eral hundred feet, to mine its said tracts of
Fol. 161. "mining land by the hydraulic process, discharg-"ing water through little giants and monitors, and "dumping all the tailings from such mines into "the North Fork of the American river.

Fol. 191. "Prior to the commencement of work in the "present pit, or lower portion of the mine, it is "estimated that there had been washed from the "upper or old washings, 67,000,000 cubic yards "of material, which also came into the American "river through Cañon creek. Also large quantities "of material were placed in the same sections of "the river from the Iowa Hill mines.

"Said defendant has been mining its said tracts "of land for about *eight years last past in the* "*mode and process aforesaid*, and up to the time of "commencing this action, and during about five
Fol. 162. "months of each year of said period, has been "daily discharging into said North Fork, between

"four and five thousand cubic yards of solid ma-
"terial from its said mine, to wit, of boulders,
"cobbles, gravel and sand, making a yearly dis-
"charge of at least six hundred thousand cubic
"yards, and will continue to discharge that quan-
"tity annually, if the working of said mine be
"permitted to continue, and at such rate it will
"require some thirty years to mine out and ex-
"haust said mineral land.

"That a large portion of the material so dumped
"by the defendant into the North Fork of the
Fol. 163. "American river has been washed down said river
"by the water and commingled with tailings from
"other hydraulic mines, and still other material,
"which is the product of natural erosion, has been
"deposited in the beds and channels of the Sac-
"ramento and American rivers, but mostly in the
"American river, and upon the lands adjacent
"to said rivers, and that by said mining of the de-
"fendant *and other mines*, the filling up, raising
"and shallowing of said rivers has been materially
"increased, to the impairment of the navigation
"of the Sacramento river, and to the excessive
"overflow of the lands adjacent to said rivers, to
"the great injury of said land, and damage, dis-
"comfort and annoyance of a great number of
"citizens of the State, owners of said land and
"residents of said valley.

"That the power of water to preserve its chan-
Fol. 164. "nels, and to clear out and carry off deposits in
"the same is proportioned—other conditions
remaining the same—to the depth of the
"stream and the freedom of said water from
"earthy matters. That the beds of said rivers
"have already become so widened and filled that
"the depth of the water therein has been greatly
"lessened; that said water at all times, is heavily
"laden with earthy matters, chiefly from mines,
"therefore, said rivers are likely to fill more rap-
"idly in the future in proportion to the quantity
"of hydraulic tailings than in the past.

Fol. 165. "That thousands of acres of good land in Sac-
"ramento valley have already been covered up by
"such débris, and if some preventive is not ap-
"plied much further and greater injury is likely
"to ensue in the future, and large tracts of land
"will probably be rendered within a few years,
"unfit for cultivation and inhabitancy.

"That the discharge from the defendant's *and*
"*other mines* so fouls the water of the American
"river at all points below, as to render said water
"unfit for any domestic use by the inhabitants.

"That the filling of the beds of said rivers, has,
Fol. 166. "to some extent, obstructed the natural and arti-
"ficial drainage of the valleys of said rivers, and
"has interfered with the percolation and flow of
"the water through the soil, and has raised the

" soil water to such an extent as would naturally
" increase the tendency to malarial diseases; but I
" do not find that, heretofore, it has had any effect
" on such diseases; and the material carried down
" by the rivers is singularly free from matter which
" could ferment and induce malaria.

" That if the said acts of the defendant *and*
" *others*, mining as aforesaid, are allowed to con-
Fol. 167. " tinue, there is imminent danger that the beds
" and channels of the lower portion of the Ameri-
" can river, and of the Sacramento river below the
" mouth of the American, will be so filled and
" choked up by tailings and other deposits, that
" said rivers will be turned from their channels,
" cutting new water-ways, injuring or destroying
" immense tracts of land, and *probably* will result
" in greatly impairing the navigability of the Sac-
" ramento river.

" That the filling in said rivers below Alder
" creek has been accumulating from year to year.
Fol. 168. " *The largest deposits were made by the floods of*
" *1861 and 1862*, since which time there has been
" a steady increase in deposit and a slow but con-
" stant working down in the channels of the rivers
" of the heavier material; that it is not possible
" to determine the proportions of such deposits
" which come from mines now working and other
" sources, but it is quite probable—in fact, almost
" certain—that very much of the larger part of that

" which injuriously fills the rivers, is composed of
" material dumped into the river from mines with-
" in ten years previous to the fill in the river.

* * * * * *

" That the acts threatened to be performed by
" the defendant, in continuing to prosecute its
Fol. 176. " mining industry in the manner set out in these
" findings, as it will do unless restrained, if allowed
" to be done, will, *in connection with like acts by*
" *others*, obstruct the navigation of the Sacramento
" river, and fill up, to some extent, Suisun Bay, de-
" stroy or injure large amounts of land, and consti-
" tute an obstruction to the free use and enjoy-
" ment of the property of a large number of citi-
" zens of this State.

* * * * * *

Fol. 178. " *In the past eight years the amount of material*
" *washed from hydraulic mines has diminished,*
" *owing to change from washing light surface*
" *gravel, with few bowlders, to heavy bottom gravel,*
" *and from steep grades in the sluices to light*
Fol. 179. " *grades.*

" The amount washed from a mine will depend
" upon the amount of water used, the character of
" material, and grade and size of sluices.

" Late improvements in hydraulic mining *do not*
" *increase the amount of material mined.*

" The various mines in the drainage area of the
" Sacramento river, have reservoirs in which they

" store about 7,600,000,000 cubic feet of water,
" which is gradually drawn off in the five months
" after the middle of July, and to that extent in-
" creases the flow in the Sacramento river.

* * * * * *

Fol. 189. " It is contended by the defendant that all the
" débris which it puts into the American river (save
" a small per cent.) remains permanently above
" Rice's bridge—a point about nine miles below
" Cañon creek—and no question in the case has
" been more minutely examined.

* * * * * *

Fol. 197. " It seems to me, a large portion of it must in-
Fol. 198. " evitably come down. The coarser material will
" travel very slowly, probably requiring many
" years before it reaches Alder creek—ten, twenty,
" or more, according to size. No doubt much
" *which was thrown into the river, many years ago,*
" is still slowly moving down, *and although all*
" *mining should cease*, will continue to come for
" many years. This is important, as showing to
" what extent stopping the work at the mines will
" afford a remedy. It appears that this part of the
" injury is easily remedied, and at comparatively
" little expense, by the erection of dams to im-
" pound the débris. If the experts are correct in
" their conclusions—and I am bound to so con-
Fol. 199. " clude—*all that is very greatly injurious could be*
" *so impounded.*

"Of course, during its slow journey the detritus
" is very greatly comminuted; much of it will be
" carried off as clay in suspension; the proportion
" cannot be determined.

"On the American river and its tributaries a
" vast amount of mining was done in early times,
" and up to this time a great deal is being done
" beside that by the defendant.

Fol. 200. "No other mine contributes annually more
" detritus to the river than the defendant; STILL I
" AM UNABLE TO SAY THAT DEFENDANT'S MINE
" ALONE, WITHOUT REFERENCE TO THE DÉBRIS FROM
" OTHER MINES, MATERIALLY CONTRIBUTES TO THE
" EVILS MENTIONED; OR, IN OTHER WORDS IF THERE
" WERE NO MINING OPERATIONS SAVE THOSE OF THE
" DEFENDANT, I AM NOT PREPARED TO SAY THAT IT
" WOULD MATERIALLY INJURE THE VALLEY LANDS OR
" THE NAVIGATION OF THE RIVER. IT IS THE AG-
" GREGATE OF DÉBRIS FROM ALL THE MINES WHICH
" PRODUCES THE INJURIES MENTIONED IN THESE
" FINDINGS.

"The lower portion of the American river is
" very much filled with débris, and has been in
Fol. 201. " places much widened. As yet, however, no
" such state of things exist there as is seen in the
" Bear and Yuba near their confluence with the
" Feather. Perhaps if it were not for that in-
" structive lesson we should not be justified in

" anticipating all the evils which may yet flow
" from these constant accumulations.

"*About one thousand acres* of valuable farming
" land have already been covered with heavy sand
" along the margin of the American river, and the
" adjacent lands are subject to frequent overflow.

" The overflows would probably occur to a con-
" siderable extent *although there were no mining.*

Fol. 202. " Very much of the trouble from this source comes
" from back-water from the Sacramento. In flood
" times, if the rains have been general, the Ameri-
" can is the first to rise. The Sacramento, then
" being at its low state, the flood rushes out loaded
" with sand and mud, and with very great velocity
" is precipitated on the Yolo shore, and there
" covers large tracts of land with its sediment. At
" such times the current is much greater than at
" any other times, and of course, a great deal of sedi-
" ment which has accumulated in the river during
" slack or low water, is carried out. About fifteen
" hours after the rise of the American, the flood
" from the Feather, also surcharged with mud,
" reaches Sacramento, and thirty-six hours later,

Fol. 203. " the floods of the upper Sacramento. By this
" the current of the American is checked and con-
" siderable land sometimes remains submerged by
" back water. At such times, of course, sediment
" is left both on the lands and in the channel of

" the river, which otherwise would have gone off
" in suspension.

* * * * * *

Fol. 207. "SACRAMENTO CITY.—I am compelled, by the
" weight of the evidence in the case, to find against
" the plaintiff on the charge that the prosecution
" of its industry by the defendant, with similar
" operations by others, has impaired, or to a
" material extent is likely to impair, the sewerage
" of Sacramento or injuriously affect the sani-
" tary condition of the city.

"The sewers of the city are about seven feet
" above tide-water. The drainage was never into
" the Sacramento river, and perhaps could not
Fol. 208. " rightfully be there. It does not appear that the
"city has been deprived of any outlets for its
" sewerage by the accumulation of débris, nor
" do I see that the drainage has been interfered
" with, except during the very highest floods,
" which may be expected about once in eight
" years. The interference, at all events, is quite
" inconsiderable. * * * * * * *

Fol. 209. "The health of the city *has been steadily im-*
"*proving* for the last twenty-five years, and dur-
" ing all that time the city has ranked very high
" in regard to healthfulness with cities of equal
" population and similarly situated. * * * *

Fol. 210. "I am entirely satisfied that the question
" whether the deposit of débris in the vicinity of

"Sacramento has affected, or will injuriously
"affect, the health of the city, is altogether too
"much a matter of theory to be the foundation of
"a judgment which shall deprive the defendant of
"the use of its property.

Fol. 211. "FOULING OF THE STREAMS.—The first mining
"in the river bars and channels discolored the
"waters to some extent as early as 1853, and the
"rivers have become more and more discolored
"by sediment since. The early mining was in
"well washed sand and gravel, which contained
"none of the red earth which has since so highly
"colored the water. The dry diggings were in
"red earth, but were prosecuted only during high
"water, and therefore, during the summer the
"rivers became reasonably clear.

"As ditches were constructed and mining in
"what are called surface diggings, as contra-distin-
"guished from deep gravel mines, commenced,
Fol. 212. "the water began to be colored as at present, red
"or yellow. This color is from sesquioxide of
"iron, which is not found in the deep gravel
"mines. The cementing material, however, con-
"tains protoxide salts of iron. Peroxidation of
"this commences upon its exposure to the air and
"water. This ferruginous clay is readily trans-
"ported by the water, and probably is not so per-
"oxidized as to discolor the water while being
"transported.

Fol. 213. "Washing in the red gravel has greatly diminished since 1875; but probably the water still "receives its deep color principally from surface "washings. There is evidence of considerable "filling in San Pablo bay, principally along the "channels through the bays. Practically there is "as yet no impairment of navigation in this bay, "and is not likely to be for many years to come. "Suisun bay is rapidly filling with sediment, but "I conclude from the evidence that the volume of "water passing through will always maintain "channels sufficient for the purposes of navigation."

There is nothing in the findings not hereinbefore quoted material to the questions now under consideration.

ARGUMENT.

The case will be discussed by us under seven different heads, as follows:

First. The Court erred in denying the motion to strike out portions of the complaint, and overruling the demurrer.

Second. The alleged injury to the public right of navigation, does not constitute a public nuisance, because, so far as the State and the United States are concerned, the acts complained of are authorized by law.

Third. The findings do not sustain the judgment, because they show that the defendant does not materially contribute to the alleged nuisance, independent of the acts of others.

Fourth. The defendant is not liable as a joint tortfeasor with other miners for the aggregate deposits complained of, but only liable, if liable at all, for its individual acts in contributing to such deposits.

Fifth. The defendant has a right to the reasonable use of its property while engagd in a lawful industry. The judgment deprives the defendant of any use whatever of its mining property, and is therefore erroneous.

Sixth. The alleged injuries to private lands do not constitute a nuisance for which any action can be maintained, either by the State or the owners of such lands, because the defendant has acquired the right, by custom, prescription and the Statute of Limitations, to do the acts complained of.

Seventh. Plaintiff is not entitled to an injunction in this case, on account of laches and other equitable considerations.

I.

The Court Erred in Denying the Motion to Strike Out Parts of the Complaint, and in Overruling the Demurrer.

The subject-matter of this action is an alleged *public nuisance.*

The complaint contains four distinct charges: 1. Injuries to navigation. 2. Injuries to health. 3. Injuries to the sewerage of the city of Sacramento. 4. Injuries to private lands owned by citizens of this State. The first three are charges of public nuisance, because each of those injuries affect each member of the community as such member. The fourth, injuries to private lands, is a private nuisance, for which the State cannot complain.

The Court found in favor of the defendant on the second and third, but against the defendant on the first and fourth of these charges.

A motion was made by the defendant to strike out the allegations in the complaint of injuries to private lands, on the ground that such injuries do not constitute a public nuisance, and that such allegations are therefore irrelevant and redundant.

It is conceded that a thing may be at the same time a *public* as well as a *private* nuisance; that it

may affect a public or common right, and therefore, in that aspect, be a public nuisance; and at the same time affect private rights, and in that aspect be a private nuisance, for which the private individuals affected have a right of action.

In an action for a public nuisance, the violation of some public or common right only must be considered; in an action by a private individual for a private nuisance, the Court can consider only the injury to the private right of property complained of.

But although a nuisance may affect the property rights of a large number of persons, it does not thereby become a public nuisance. A nuisance is only public because it affects some *public or common right*, to which each member of the community, as such member, is entitled.

The owners of the lands alleged to be injured hold them as individually acquired rights, not as rights in common with all other citizens. They do not own these lands by virtue of the fact that they are members of the community, but by virtue of the several titles they have acquired as individuals. The public, as such, have no rights in or to these lands, and it cannot be said that any injury to such lands affects any public or common right, or affects the people constituting the public.

Such injuries would only affect those individuals owning the land in question, who, in any community, would form a very small part of the public. A nuisance which injures only the lands in a neighborhood would not injure the individuals in such neighborhood not owning lands, and such nuisance would be a private nuisance; for although it may injure a number of persons, viz., land owners, it would not injure them in their rights as members of the community, but only in such property rights as they have acquired as individuals.

Familiar examples of public rights are the right of navigation, the right of using public roads or highways, and the like.

Abbott's Law Dictionary gives the following definition of nuisances:

> Nuisances are termed *public*, when they affect the surrounding community generally, when they impair the rights of neighboring residents as members of the public; and *private*, when they specially injure individuals.

Rapalje and Laurence's Law Dictionary gives the following definition:

> A public or common nuisance is an act which interferes with the enjoyment of a right which all members of the community are entitled to. * * * A private nuisance is such a continuous infringement of a natural right of property as would in process of time give the wrong-doer an easement or prescriptive right to do an act which was originally tortious.

Adams, in his work on Equity, defines nuisances as follows:

Nuisances are of two kinds: Public and Private. A public nuisance consists in the doing anything to the annoyance of all the King's subjects, *e. g.*, the obstructing a highway or public river, or the carrying on of offensive or dangerous trades, or the neglecting to do anything which the common good requires, *e. g.*, the omission to repair a highway or public bridge. A private nuisance is an act done unaccompanied by an act of trespass, which causes a substantial prejudice of the hereditaments, corporeal or incorporeal, of another, *e. g.*, diverting a water course so as to interrupt the right of another person that it should run undisturbed to his meadow or mill; obstructing ancient windows, so that the owner cannot enjoy the light so freely as before; or disturbing a franchise, by setting up, without license from the Crown, a fair, market, or ferry, so near to a more ancient one, as to diminish its custom.

Adams' Eq., 7 Am. Ed., p. 210.

Greenleaf, in his work on Evidence, states what it is necessary to prove to substantiate the charge of public nuisance. He says:

In proof of this charge, evidence must be adduced to show, 1st, that the act complained of was done by the defendant; and this will suffice, though he acted as the agent or servant by the command of another; 2d, *that it was to the common injury of the public, and not a matter of mere private grievance.*

3 Greenleaf's Ev., Sec. 186.

King vs. *The Morris Essex R. R. Co.*, 18 N. J. Eq., 397, was a bill in equity by a land owner to enjoin a railroad company from allowing sparks to escape from the locomotive so as to occasion the destruction of property by fires. The objection was made that it was a public nuisance, and that the bill should have been brought by the State.

In answering that objection, the Vice Chancellor said:

Nor is it necessary that an injunction or relief in this case should be applied for in the name of the State or Attorney-General. This is not a public nuisance, although it may injure a great many persons. The injury is to the individual property of each. The nuisance is public when it affects the rights enjoyed by citizens, *as a part of the public;* as, the right of navigating a river, or traveling upon a public highway; *rights to which every citizen is entitled.*

Stetson vs. *Faxon*, 19 Pick., 147, was an action brought against the defendant, who had built a warehouse projecting into the street in the city of Boston, so as to injure plaintiff's warehouse, which was the adjoining building on the same street. It was objected that the obstruction of the street was a public nuisance, for which the public alone could sue. The Court rendered an elaborate and well-considered opinion, and drew the distinction between a public nuisance, for which the people may have an action, and a private nuisance, for which private persons alone may sue. The Court said:

The people at large are supposed to be injured, merely because they cannot pursue a particular track; which is an inconvenience felt by thousands, to be redressed by a prosecution in the name of the Commonwealth. They suffer no actual particular injury to their trade or estates, and a prosecution on the behalf of the public furnishes the appropriate remedy.

But individuals who, either in their persons or estates, suffer great damage, which may be proved to proceed and follow necessarily from the public nuisance, surely stand upon different ground, and each may have his action and recover for the particular damage, according to the evidence.

Take the case cited from 1 Bingh. New Rep., 222. The plaintiff's lands were inundated by means of the nuisance. *The inhabitants of the borough who had no lands in that situation could only justly complain of a common annoyance.* But all the individuals who held lands in severalty, might severally maintain their actions for their several special damages. So in the case cited from 2 Bingh. New Rep., 281, which has a strong

resemblance to the case at bar. The plaintiff there was deprived of the profits of his book-store, and his estate was greatly prejudiced by the public nuisance. But the community had no estate, and no book-stores, in that situation. They only suffered such inconvenience from the obstruction of the highway as was common to all the people. Let them indict the wrong-doer if they will. So in the case cited from the American Jurist. It was the plaintiffs whose wharf estate was greatly deteriorated, by the public nuisance. The inhabitants of Baltimore were rather benefited than injured by the public improvement, by which the plaintiffs' interest was destroyed.

So in the case at bar, the citizens of Boston who want a mere right of passage from Market Square to the sea, may pass through North Market street as well as they could through the old way, which was obstructed. They have no lands or warehouses to be destroyed or greatly impaired; they have no loss of rents from the desertion of tenants.

They, at most, are obliged to travel in a new street near to the old one, and probably do not desire to have the old one reopened. At most, they could complain only of what is technically a common nuisance, by which they experienced only an inconvenience *common to all the citizens.*

This distinction between public and private nuisances is recognized by all law writers on the subject. No case can be found where it has been held that injuries to the private property rights of individuals constitute a public nuisance.

See 4 Blackstone's Comm., 166, etc. See also 1 Russell on Crimes, 435, etc., where almost every possible example of public nuisance is given, and the whole subject fully discussed.

It is a significant fact that it is no where suggested, or even intimated, that injuries to lands held by individuals constitute a public nuisance. On the other hand, such injuries are universally

held to constitute only a private nuisance, for which only a private action will lie.

See 3 Blackstone Comm., 216, etc., etc.
Cooley on Torts, 565, etc., etc.

The Supreme Court of this State has maintained the same distinction in *Yolo County* vs. *City of Sacramento*, 36 Cal., 139, where it held that a wing-dam in the Sacramento river, so far as it affected navigation, was a public nuisance; but so far as it obstructed the reclamation of the swamp land district, it was a private nuisance.

The Codes Settle the Question.

If there be any doubt, upon authority, as to whether or not the deposit of débris upon the private lands described in the complaint constitutes a public nuisance, such doubt is removed by the various provisions of the codes of this State. A nuisance is defined:

> Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Civil Code, Sec. 3479.

This definition covers all nuisances, both public and private, and of course includes both injuries to *persons* and *to property*.

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of *persons*, although the extent of the annoyance or damage inflicted upon individuals may he unequal.

Civil Code, Sec. 3480.

Every nuisance not included in the definition of the last section is private.

Civil Code, Sec. 3481.

The Code thus declares a public nuisance to be one which affects *persons;* i. e., either an "entire community or neighborhood, or any considerable number of persons." All reference to *property* is excluded from this definition of a public nuisance.

It cannot be said that injuries to *persons* include injuries to *property*, because the Code has made a distinction between the two classes of injuries, which must be observed in reading or construing the above sections defining nuisances—public and private.

An injury is of two kinds—1, to the person ; 2, to property.

Code of Civ. Pro., Sec. 27.

An injury to property consists in depriving its owner of the benefit of it, which is done by taking, without holding, deteriorating or destroying it.

Code of Civ. Pro., Sec. 28.

Every other injury is an injury to the *person.*

Code of Civ. Pro., Sec. 29.

These definitions of injury to persons and injury to property must be observed throughout

the Codes in determining the intent and meaning of the language used. It is plain that the injuries to land alleged in the complaint fall completely within the definition of injuries to property. It is not, therefore, an injury to persons as defined by the Code, and is not a public nuisance within the meaning of Sec. 3480 of the Civil Code. The Code confines a public nuisance to injuries to persons, and injuries to property are necessarily excluded. Three additional words would have included injuries to private property in the definition of a public nuisance.

If the Legislature had intended to include injuries to private property, as well as injuries to persons, it would have inserted after the word "persons" in Section 3489, Civil Code, the words "*or their property.*"

The Section would then have read:

> A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, *or their property*, although the extent of the annoyance or damage inflicted upon individuals, *or their property*, may be unequal.

The words italicized were not inserted, but were, *ex industria*, excluded.

Construing the Codes, then, according to their plain meaning, they are in harmony with the current of decisions which hold that a public nuisance is an injury to a public or common right, that is to

say, an injury to such rights as each member of the community has as such member, and not such rights as he may acquire as an individual.

By separating the several clauses in Sec. 3479 of the Civil Code, above quoted, the distinction between a public and a private nuisance is readily seen.

"Anything which is injurious to health, or is "indecent or offensive to the senses, so as to in- "terfere with the comfortable enjoyment of life," is a public nuisance, if it affects a considerable number of *persons*.

"Anything which unlawfully obstructs the free "passage or use in the customary manner of any "navigable lake, or river, bay, stream, canal or "basin, or any public park, square, street or high- "way," is also a public nuisance.

"Anything which is injurious to or an obstruc- "tion to the free use of property, so as to inter- "fere with the comfortable enjoyment of *property*," is a private nuisance.

Hence, it follows that the deposit of débris upon lands of citizens of this State is only a private nuisance.

The people of the State, as we have said, have no right or interest in the lands owned by private individuals, and, therefore, are not affected by injuries to such lands, and certainly have no cause of action respecting such injuries. Upon what

theory, then, can the State maintain a suit to redress the injuries done to the property of individuals owning lands on the banks of the American river? That the State has no general power to commence suits to redress civil wrongs sustained by some citizens at the hands of others, was decided in *People* vs. *Albany and Susquehanna R. R. Co.*, 57 N. Y., 161, in which the Court said:

> The people of this State have no general power to invoke the action of the courts or of justice, by suits in their name of sovereignty for the redress of civil wrongs, sustained by some citizens at the hands of others. When they come into court as plaintiffs in a civil action they must come upon their own right, for relief to which they are themselves entitled. It is not sufficient for the people to show that wrong has been done to some one. The wrong must appear to be done to the people in order to support an action by the people for its redress. The suit now before us seems to have been instituted on a different theory. It sets forth various acts as wrongful, which, if wrongful, affect no public right. These wrongs are wrongs to individual citizens, and not to the State, and are remediable at the suit of the parties injured only.

It was likewise said by the Supreme Court of California in *People* vs. *Stratton*, 25 Cal., 242, that

> If the State had no interest in the subject-matter of the proceeding commenced to set aside the patent granted to the defendant, it is difficult to understand upon what principle the information, as an information purely on behalf of the State, could be sustained. It is like a complaint that fails to state facts sufficient to constitute a cause of action, for the reason that it does not appear that the plaintiff has any interest in the subject matter of the action.

Hence we say that the allegations in the complaint of injuries done to lands held by individuals, which could only constitute a private nuisance, were irrelevant and redundant, and should

have been stricken out; and the Court erred in admitting evidence against the objection of the defendant, in proof of such allegations.

We should not expect the Court to reverse the judgment in this case upon the ground that these rulings were erroneous, if they did not affect a substantial right of the defendant; but the defendant certainly had the right to have the issue in this case confined to matters constituting a public nuisance, and should not have been compelled to answer as to the alleged injuries to private property.

The course pursued in the trial of the case made it impossible to arrive at a just determination of the real issue, which is covered up and encumbered in a mass of irrelevant testimony. We call the attention of the Court to the 45 volumes of evidence in this case, to show the hopeless task which has been imposed upon the defendant by the random, scattered, irrelevant and redundant charges in the complaint.

But the errors complained of cannot be considered immaterial or harmless, in view of the fact that the lower Court granted the injunction principally on the ground of injuries to private lands.

In commenting upon the equitable circumstances contended for by the defendant's counsel, the Court said:

The equitable circumstances alluded to are manifest, and could hardly be too strongly stated. So great a calamity to so many people as would result from a judgment in this case, were it to be a precedent, has probably never been produced by any case in this country. And the acts which are said to be wrongful have certainly been so long tolerated, without objection, if they have not been encouraged, that no shadow of blame can possibly attach to those who have invested their money in it. If the question were in a legislative body, whether some law which had permitted it, and under the sanction of which it had grown into importance, should be repealed, the suggestion would be irresistible. So it would in an action, perhaps, where it involved only the *proprietary rights* of the government, or any interest of the government simply considered in its corporate capacity. Such were the facts in the cases cited for the defense. But there can be no estoppel which shall prevent the State from exercising its general governmental powers in providing for good government; and certainly no equities can grow up in favor of one set of citizens as against others by the fact that illegal acts have been long tolerated, or that they are convenient in the prosecution of a great industry, the importance of which has been repeatedly recognized. Here are many citizens complaining *that their rights are being violated, their property and their health threatened*, and their common highways over the navigable waters obstructed by the illegal acts of the defendants and others. (Trans. fol. 225–6–7.

It is apparent from the foregoing that no injunction would have been granted for the public nuisance alone; but the consideration of "injury to private lands" was the controlling element in the mind of the judge. He held that the equitable circumstances alluded to might properly have a controlling influence if the action only involved the proprietary rights of the government, or any interest of the government, simply considered in its corporate capacity. But because of the injuries to private lands, which the Court below considered, it held that the equitable considerations urged could not avail the defendant.

Taking the whole record together, it is manifest that the injury to private lands was the principal ground upon which the injunction was granted.

The Court found, as a conclusion of law, that injuries to private lands constitute a public nuisance, which was clearly erroneous.

The third conclusion of law reads as follows:

That the said acts of the defendant constitute a public nuisance, in that they are an obstruction of the free use by a considerable number of the citizens of this State of their said lands, situate along the banks of said rivers as aforesaid, so as to interfere with the comfortable enjoyment thereof, and in that they unlawfully obstruct the free passage and use in the customary manner of the said Sacramento river. (Trans. fol. 215.)

It will be observed that the Court expressly finds that injuries to private lands constitute a public nuisance. It is, therefore manifest, that the error complained of in refusing to strike out the charges in the complaint of injuries to private lands, was material, and affected the substantial rights of the defendant.

II.

The Acts of the Defendant are Authorized by the Legislation of the United States and of the State, so far as they Affect the Public Right of Navigation, and, Therefore, do not Constitute a Public Nuisance.

This rule of law is well stated by Mr. Wood in his work on Nuisances, in the following language:

It may, however, be stated, that a person or corporation authorized by law to do a particular thing, as to build a railroad,

a turnpike, a bridge across a navigable stream, or to carry on a particular class of business, as for the manufacture of gas to supply the people of a town or city therewith, so long as they keep within the scope of the power granted, are completely protected from indictment and punishment for a public nuisance, and from proceedings either at law or in equity in behalf of the public therefor.

Wood on Nuisances, p. 852, Sec. 753.

Judge Cooley, in his work on Torts, states the rule as follows:

It being found that a public easement exists, it may then appear, perhaps, that what is complained of has been authorized by the State. If so, no action can be maintained on the assumption that what is thus allowed is a public nuisance, for that cannot be a public nuisance that the State *assents to* and authorizes. It would be a contradiction in terms to say that the State assents to a certain act, and yet that the act constitutes an offense against the State.

Cooley on Torts, p. 615.

The following cases fully sustain the doctrine above stated.

Transportation Co. vs. *Chicago*, 99 U. S., 635.

Rex vs. *Pease*, 4 Barn. and Adol., 30.

Hinchman vs. *Patterson*, 17 N. J. Eq., 75.

Davis vs. *Mayor of N. Y.*, 14 N. Y., 524.

Veazie vs. *Dwinel*, 50 Maine, 482.

Carson vs. *C. P. R. R. Co.*, 35 Cal., 333.

McDonald vs. *English*, 85 Ill., 235.

Pittsburgh vs. *Brown*, 67 Ind., 45 S. C., 33, Am. Rep., 73.

Att'y-General vs. *Evart Booming Co.*, 34 Mich., 475.

Easton vs. *R. R.*, 24 N. J. Eq., 55.
People vs. *Law*, 34 Barb., 514.
First Bap. Ch. vs. *Utica and Schenectady*, 6 Barb., 313.
People vs. *Gaslight Co.*, 64 Barb., 55-69.
Harris vs. *Thompson*, 9 Barb., 363.
Green vs. *Swift*, 47 Cal., 536.
Comm. vs. *Reed*, 34 Pa. St., 282.
Stoughton vs. *State*, 5 Wis., 291.

We think it must be conceded that the State and Federal Legislatures together have the power to authorize hydraulic mining, with its consequent injuries to the navigable rivers.

The authority of Congress to act in the matter, *after the admission of the State*, extends only to the regulation of commerce, and we may concede, for the purpose of this argument, that Congress could not, under this power, authorize anything which would destroy the navigability of the rivers without the consent of the State. But where the State has by statute authorized an obstruction to a navigable river *wholly within its limits*, such statute is not unconstitutional or void, even though such State was admitted into the Union upon the condition that its navigable rivers "shall be com-" mon highways, and forever free, as well to the in-" habitants of a State as to all the citizens of the " United States, without any tax, duty, impost or " toll therefor."

This was decided in *Pound* vs. *Turck*, 95 U. S., 459, where a dam had been built across the Chippewa river in Wisconsin, under the authority of a statute of that State; and again in *Escanaba Co.* vs. *Chicago*, 107 U. S., 678, where a bridge had been built across the Chicago river, under the authority of a statute of the State of Illinois. These statutes were held constitutional, notwithstanding the provision above quoted, declaring the navigable waters common highways, to remain forever free.

Heerman vs. *Beef Slough Manufacturing Co.*, 1 Fed. Rep., 145, illustrates the point under consideration. The State of Wisconsin authorized the defendant to construct certain piers and booms for the purpose of rafting logs down the Chippewa river. Such obstruction practically excluded steamboat navigation from the river, and the use made by the defendants of the river in rafting logs, in addition to the obstruction, tore down the banks, and in various ways impeded navigation. An action was brought in the United States Circuit Court for the abatement of the nuisance.

The Court held that, in the absence of any action on the part of Congress, the State had power to authorize the obstruction complained of; that the State Legislature might in its discretion extend to the defendant such privileges as would practically exclude all other uses of the river

as a public highway, and, in the absence of Congressional action, was the exclusive judge of what kind of navigation upon the river would most promote the public good.

See also *Attorney-General* vs. *Evart Booming Co.*, 34 Mich., 462.

It is unnecessary, however, to consider the relative powers of the two governments over the navigable waters within the limits of a State. It is sufficient for the purposes of this argument that the concurrent action of the two governments has authorized hydraulic mining, with its necessary consequences.

Action of the United States.

By the Treaty of Gaudalupe Hidalgo, in February, 1848, Mexico ceded California to the United States. The great body of the lands and all the mines of precious metals in the territory ceded belonged to the Mexican Government and passed to the United States under the treaty. In January, 1848, gold had been discovered, and it was soon known that the beds and bars of all the mountain streams, and the ravines, gulches and cañons leading to them were fabulously rich in gold, and within a few months there was such an influx of immigrants from the Eastern States that the population increased from less than 10,000 in 1847 to more than 100,000 in 1850.

All this new population came to mine, and distributed itself through the mining region, so that in 1850, at the time of the organization of the State, and for some years after, nearly all the people of the State were miners and to be found in the mining camps in the Sierras. Even in 1852 the vote of El Dorado county was greater than that of San Francisco, which then embraced San Mateo.

In 1849, a Constitutional Convention was called, a Constitution adopted, and a State Government organized, with its proper executive, legislative and judicial officers.

In 1850 California was admitted as a State—and by the *third* section of the Act of Admission, it was *enacted:*

> That the said State of California is admitted into the Union upon the *express condition* that the people of said State, through their Legislature, or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and the right to dispose of the same, shall be impaired or questioned.

The free right of sale and disposition necessarily carries with it the right to use, and if there be but one way of profitable use, to use in that way.

If the lands, when sold, could not be used, the Government could find no purchasers. If the State could, by prohibitory legislation or otherwise, prevent the purchasers of mining lands from

mining them, it could successfully interfere with the primary disposal of the public lands, and could impair the right to dispose of them.

Even, at that time, the Government was fully aware of the richness of the mines acquired, and that they covered a large area, but had not then determined upon any definite policy for the disposition or management of them.

In *Ivanhoe Mining Company* vs. *Keystone Consolidated Mining Company*, 102 U. S., 172, Mr. Justice Miller says:

> Very soon after the conquest of California and its cession to the United States by Mexico, it was found to be rich in the precious metals, and such was the rapid influx of immigrants from the Eastern States that the California population at the time it was organized as a State in 1850, was largely composed of mining camps and settlements engaged in mining these metals.
>
> As nearly all those mines were discovered on land the title of which was vested by the treaty in the Government of the United States, it became important to determine what course the Government would take with regard to this new source of untold wealth.
>
> The Spanish Government, to which this territory and much other, rich in precious metals, had once belonged, had instituted a system of laws concerning her mines by which private enterprise was invited to develop them, and a revenue secured at the same time to the Crown, which made Spain for a time the richest of the civilized governments of the world. This system Mexico had inherited and perpetuated, and there were many American statesmen who believed that with the territory we had acquired the laws which governed the production of gold from the earth. Others insisted that, whether this were so or not, it would be a wise policy for the Government to secure to itself a fair proportion of the metal produced from its own ground. But, while Congress delayed and hesitated to act, the swarm of enterprising and industrious citizens filled the country, and, before a State could be organized, had become its dominating element, with wealth and numbers and claims which demanded consideration.

In his message to Congress, in 1849, President Taylor, calling attention to the mineral lands of California, said:

In order that the situation and character of the principal mineral deposits in California may be ascertained, I recommend that a geological and mineralogical exploration be connected with the linear surveys, and that the mineral lands be divided into small lots, suitable for mining, and be disposed of, by sale or lease, so as to give our citizens an opportunity of procuring a permanent right of property in the soil. This would seem to be as important to the success of mining as of agricultural pursuits.

Hon. Thomas Ewing, Secretary of the Interior, in his report of that year, directed special attention to this subject. From that report we make the following extracts:

MINERAL LANDS IN CALIFORNIA.

It is understood that a few of the larger grants cover, to some extent, the mines of gold and quicksilver.

By the laws of Spain, these mines did not pass by a grant of the land, but remained in the Crown, subject to be disposed of according to such ordinances and regulations as might be from time to time adopted. Any individual might enter upon the lands of another to search for ores of the precious metals, and having discovered a mine, he might register and thus acquire the right to work it on paying to the owner, the damage done to the surface, and to the Crown, whose property it was, a fifth or tenth, according to the quality of the mine. If the finder neglected to work, or worked it imperfectly, it might be denounced by any other person, whereby he would become entitled.

This right to the mines of precious metals, which by the laws of Spain remained in the Crown, is believed to have been also retained by Mexico while she was sovereign of the territory, and to have passed by her transfer to the United States. It is a right of the sovereign in the soil, as perfect as if it had been expressly reserved in the body of the grant; and it will rest with Congress to determine whether, in those cases where lands duly granted contain gold, this right shall be asserted or relinquished. If relinquished, it will require an express law to effect the object; and if retained, legislation will be necessary to provide a mode by which it shall be exercised. For it is

to be observed that the regulation permitting the acquisition of a right in the mines by registry or by denouncement was simply a mode of exercising, by the sovereign, the proprietary right which he had in the treasure as it lay in and was connected with the soil. Consequently, whenever that right was transferred by the transfer of the eminent domain, the mode adopted for its exercise ceased to be legal, for the same reason that the Spanish mode of disposing of the public lands in the first instance ceased to be legal after the transfer of the sovereignty.

Thus it appears that the deposits of gold, wherever found in the territory, are the property of the United States.

No existing law puts it in the power of the Executive to regulate these mines, or protect them from intrusion. Hence, in addition to our own citizens, thousands of persons, of all nations and languages, flock in and gather gold, which they carry away to enrich themselves, leaving the lands the less in value by what they have abstracted; and they render for it no remuneration, direct or indirect, to the Government or people of the United States.

The mining ordinances of Spain provide a mode of laying out the mines, which applies only to districts where veins of ore occur in the rocks, and where it is to be mined by following the metalliferous dike or stratum in the direction of its dip, and along its line of strike. But the gold which is found in the alluvion in California, is continuous over a great extent of country, and it may be wrought upon any lot having surface earth and access to water. This district may be, therefore, divided into small lots, with narrow front on the margin of the streams, and extending back in the form of a parallelogram. Where gold is found in the rocks *in situ*, the lots to embrace it should be larger, and laid off according to the Spanish method with regard to the dip and strike. But so various are the conditions under which the precious metals may be found by a careful geological exploration, that the mode of laying off the ground cannot be safely anticipated, but must be left to the direction, on the spot, of a skillful engineer, whose services will be indispensable.

The division, disposition, and management of these mines will require much detail; but if placed on a proper footing, they may be made a source of considerable revenue. It is due to the nation at large that this rich deposit of mineral wealth should be made productive, so as to meet, in process of time, the heavy expense incurred in its acquisition.

If the United States sell the mineral lands for cash, and transfer at once all title to the gold which they contain, but a very small part of their value will probably be realized. It would be better, in my opinion, to transfer them by sale or

lease, reserving a part of the gold collected as rent or seigniorage.

When the land is properly divided, it will, in my opinion, be best to dispose of it, whether by lease or sale, so as to create an estate to be held only on condition that the gold collected from the mine shall be delivered into the custody of an officer of the Branch Mint.

So far as the surface deposits extend, I am of the opinion that leases will, for a yet further reason, be preferable to sales of the lands. If sold, they will pass at once into the hands of large capitalists; if leased, industrious men without capital may become the proprietors, as they can work the mines and pay the rent out of the proceeds. But where gold is found in the rocks in place, the case is different. These must necessarily fall at once into the hands of large capitalists or joint stock companies, as they cannot be wrought without a heavy investment.

From the time of this report of Secretary Ewing up to the passage of the Act of 1866, the attention of Congress was from year to year directed to the subject of the California mines, but not until that year was any definite plan for the disposition of them matured.

By the "Act to provide for the survey of public "lands in California, the granting of pre-emption "rights therein, and for other purposes," approved March 3, 1853, the public lands in the State, surveyed or unsurveyed, excepting the 16th and 36th sections, lands claimed under foreign grants, lands appropriated and reserved, and *the mineral lands*, were opened to pre-emption under the Act of 1841, and the Surveyor-General was directed to make surveys of the public lands, with the proviso, however, "that none other than "*township lines* shall be surveyed *where the lands*

" *are mineral,* or are deemed unfit for cultivation."

That Act also donated to the State *seventy-two* sections for use of a seminary of learning, and *ten* sections for public buildings, but specially excepted mineral lands. It also made provision for procuring title to town sites, under the Act of May 23d, 1844, "except such town lots as are located " on or near mineral lands, the inhabitants of " which shall have the right of occupation and " cultivation *only* until such time as Congress " shall dispose of the same."

That Act also granted to the State for its public schools the 16th and 36th sections, using words of present grant—"which shall be and hereby are granted to the State for," etc.—yet it was held by the Supreme Court of the United States, in *Ivanhoe Mining Co.* vs. *Keystone Consolidated Mining Co.*, 102 U. S., 167, that lands which at the time of the survey were known to be mineral, did not pass to the State under that grant.

Speaking of these exceptions, the Court, at page 174, says :

> The purpose of these provisions was undoubtedly to reserve these lands, so much more valuable than ordinary public lands, and the nature of which suggested a policy different from other lands in their disposal, for such measures in this respect as the more matured wisdom of that body, which by the Constitution is authorized to dispose of the territory or other property of the United States, should afterwards devise.

By the Act of July 26th, 1866, Congress declared "the mineral lands of the public domain, both surveyed and unsurveyed," free and open to exploration and occupation by all citizens of the United States, subject to such regulations as might be prescribed by law, "*and subject, also, to* "*the local customs or rules of miners* in the several "mining districts, so far as the same may not be "in conflict with the laws of the United States." By that Act Congress also provided for the sale of quartz claims that had been improved according to the local customs or rules of miners, and adopted a plan for the protection and disposition of its mining lands, widely different from that which had, for many years, prevailed for the sale of agricultural lands, and also granted a right of way for canals and ditches for mining purposes over the public lands in the future by expressly declaring that "whenever by priority of posses- "sion, rights to the use of water *for mining, ag-* "*riculture,* manufacturing or other purposes, have "vested or accrued, and the same are recognized "and acknowledged by the local customs, laws, "and the decisions of courts, *the possessors and* "*owners of such vested rights* SHALL BE MAIN- "TAINED AND PROTECTED *in the same.*

By the sections added to the Act of 1866, by the amendatory Act of July 9, 1870, the plan for sale was extended to *placer* claims with the special

provision that none of the rights conferred by sections 5, 8 and 9 of the original Act should be abrogated, but should be extended to all public lands affected by the Act, and that all patents for agricultural lands should be made subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as might have been acquired under, or recognized by the 9th section of the original Act.

The Act of May 10, 1872, is entitled "An Act "to promote the development of the mining re- "sources of the United States." That Act also declares "that all valuable mineral deposits in "lands belonging to the United States, both sur- "veyed and unsurveyed," are free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

This Act, as well as that of 1866, recognizes the customs and regulations of mines, and gives to them the force of the law, and makes them a part of the law of the land.

When the Acts of 1866, 1870 and 1872 were passed, mining was conducted as it is to-day and by the same appliances. Monitors and little giants were then in use, and the tailings from the mines were deposited in the cañons, ravines and gulches, and in the rivers themselves, just as they now are, and we must suppose that Congress understood, and was fully informed, as to the methods employed and the results that must necessarily follow. The waters of the Sacramento, Feather, American and Yuba were then as muddy as now, and had been so for years. The floods of 1861–2 had already covered with sediment the bottom lands of these rivers.

All these things were known to everybody, and we cannot suppose that Congress, in 1866 or 1872, was ignorant of them—that it was passing laws for the development and sale of its mineral lands and the protection of water rights, in the dark.

These mineral lands had been a subject of careful consideration and study by statesmen and politicians from the beginning of mining in the State.

It was well known that within five years after the discovery of gold at Coloma more than two hundred thousand men had come to the State and had engaged in mining in the mountain streams, ravines, gulches and cañons, and on the bars, and that, with the rude implements then used, more

than $50,000,000 per annum, in gold, had been won. It was well known, too, that the deep gravel beds had been discovered and were being worked; that new machines had been invented and were being used, and that mining was being conducted in exactly the same way, and with exactly the same machines and facilities that it is now being conducted, and that California, from the date of the discovery of gold in 1848, had produced more gold than all the rest of the world, and that it was gold alone that had given it an American population—that had made it a State.

Congress must be presumed to have known and to have "had in view all the consequences which were to follow from doing the act which they authorized."

Stoughton vs. *The State*, 5 Wis., 291.

We are not without authority for our presumptions in this regard.

In *Sparrow* vs. *Strong*, 3 Wall., 97, Chief Justice Chase, speaking of the mines in the State of Nevada, says:

> We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, *regulations, and customs* of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the National Government, but *under its implied sanction*, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.

The Chief Justice had been Secretary of the Treasury during the rebellion, and had had more occasion, perhaps than any other man in official position, to know how largely the credit and the financial success of the Government had been during that struggle, dependent upon the product of the mines of Nevada and California, and how largely they had contributed to the prosperity and improvement of the whole country.

In *Atchison* vs. *Peterson*, 20 Wall., 512, Justice Field, speaking for the Court, says:

> The Government, by its silent acquiescence, assented to the general occupation of the public land *for mining*, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement.

And in *Jennison* vs. *Kirk*, 98 U. S., 456, the same learned Judge, speaking of the 9th section of the Act of 1866, says:

> The object of the section was to give the *sanction of the United States*, the proprietor of the lands, to possessory rights, which had previously rested solely upon the local customs, laws and decisions of the Courts, and to prevent such rights from being lost on a sale of the lands The section is to be read in connection with other provisions of the Act of which it is a part, *and in the light of matters of public history relating to the mineral lands of the United States.*

And quoting the statements of the author of the Act of 1866:

> And the Act proposed continued the system of free mining, holding the mineral lands open to exploration and occupation, subject to legislation by Congress and to local rules. It merely recognized the obligation of the Government to respect private rights which had grown up *under its tacit consent and approval.*

It proposed no new system, but sanctioned, regulated and confirmed a system already established, to which the people were attached. (Cong. Globe, 1st Sess., 39th Cong., part IV., pp. 3225–3228.)

In *Broder* vs. *Water Company*, 101 U. S., 276, Mr. Justice Miller says:

It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for the purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, *by its conduct*, recognized and encouraged and was bound to protect, before the passage of the Act of 1866.

We are of opinion that the section of the Act which we have quoted was rather a voluntary *recognition of a preëxisting right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument. (*Atchison* vs. *Peterson*, 20 Wall., 507; *Basey* vs. *Gallagher*, id., 670; *Forbes* vs. *Gracey*, 94 U. S., 762; *Jennison* vs. *Kirk*, 98 id., 453.)

At the time of the passage of those Acts, Congress knew, not only that mining was being prosecuted in the way and manner in which it had been and still is prosecuted, and the effects it had produced on the rivers, but that it could not be prosecuted in any other way, and, so knowing, it made provision for the free occupation and exploration of all the mineral lands, and adopted a plan for their sale to those who had worked and would continue to work them, just as they are now being worked.

Under the provisions of those Acts, the Government sold and conveyed to the defendants the

mining claims which they are now working. If the Government would have had the right itself to work the mines, then its grantees by their purchase acquired that right. They bought and the Government sold the land as mineral, and of no value, present or prospective, except to be mined.

Congress had reserved these lands from all its grants, and from homestead and pre-emption entries, because they were mineral.

It had concluded to sell them as mineral, and had matured and adopted a plan for their sale, and for the protection of water rights, necessary for their successful working.

If Congress had power to authorize the work of mining, by those Acts it did authorize it, and did recognize and confirm all that, by its silent acquiescence, it had permitted and authorized to be done before that time, and the work so permitted and authorized could not be a public nuisance.

Drainage and Easements for the Working and Complete Development of the Mines.

This subject Congress deemed special and important.

The 5th section of the Act of 1866 contains a provision, which is most significant and important,

in connection with the matters involved in this suit. That section is as follows:

> Sec 5. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development, and those conditions shall be fully expressed in the patent.

Revised Statutes., Sec. 2338.

The rights granted by this section were expressly extended to placer claims by the 17th section of the Placer Mining Act of 1870 in the following language:

> That none of the rights conferred by sections 5, 8 and 9, to which this is amendatory, shall be abrogated by this act, and the same are hereby extended to all public lands affected by this Act.

The manifest object of section 5 was to authorize the local legislature to provide easements, drainage and other necessary means to the complete development of the mines. These rights and benefits were conferred upon mine owners. The condition of sale imposed was that each mine should bear, when necessary, the burden of the easements and drainage necessary to work and develop other mines, and this without compensation. The local legislature could impose this burden upon mining lands and all other lands sold by the United States subject to that condition, without providing compensation to the owners of the same.

Can there be any doubt that Congress has expressly consented that the State may provide the necessary easements and drainage for the complete development of the mines?

In giving this consent, Congress did not say that the mines should not be drained into the navigable rivers.

At the time Congress passed the laws in question, the mines were being drained into the navigable rivers. This was the public history of the mining region. Congress must have intended this use of the navigable waters or it would have prohibited the same when it was dealing with the subject.

But there is good reason why Congress did not prohibit this use of the navigable waters, and why it intended that such use should continue, *which is that the mines could not be worked or developed without drainage into the navigable waters.*

The Court below fixed the year 1862 as the period when the navigation in the Sacramento river was impaired by filling from débris. (Trans. fol. 150.)

When these acts were passed, the effect upon navigation by the fill in the Sacramento river was as well understood as now; and these acts of Congress must be construed with reference to the subject-matter—the condition of things existing at the time of their passage. (Potter's Dwarr. on Stat., p. 200; Sedg. Stat. Law, p. 359.)

If, as it must be conceded, the mines could be completely developed in no other mode, it follows that Congress authorized the drainage into the navigable streams, with all its consequent results.

A thing within the intention of the makers of the statute, is as much within the statute as if it were within the letter.

U. S. vs. *Freeman*, 3 How., 565.
U. S. vs. *Babbitt*, 1 Black., 61.

What is implied in a statute is as much a part of it as if it was expressed.

U. S. vs. *Hudson*, 10 Wall., 406.

Whoever grants a thing, is supposed also tacitly to grant that without which the grant itself would be of no effect.

Broom's Legal Maxims, star page 463–4.
Civil Code, Sec. 3522.

The United States has not been unmindful of the obligations incurred by its legislation, which sanctioned the appropriation and use of the waters of the streams for mining purposes, and the consequent adulteration of those streams; nor has Congress failed to provide the legislation necessary to avert the evils resulting from its consent to the necessary easements for the drainage and working of mines.

On the 14th day of June, 1880, the following provision was inserted in what is known as the "River and Harbor Bill":

The Secretary of War is hereby directed to cause to be made such examinations and surveys as may be necessary to devise a system of works to prevent the further injury to the

navigable waters of California from the débris from the mines, and the estimates of the cost of such works, and report the result of such examinations, surveys and estimates of cost of proposed works, made in pursuance hereof, to Congress, at its next session. (21 Stats. at Large, p. 169.)

By this Act, Congress fully assumed the responsibility of protecting the California rivers from injuries to navigation occasioned by mining débris. In pursuance of this law, Col. Mendell, one of the ablest engineers in the United States Army, was detailed to make an examination and report, which he did on January 26, 1882. This report is an official document, of which the Court will take judicial notice.

Upon such report, the following appropriation was made by Congress in 1882:

For the improvement and *protection* of the navigable channels of the Sacramento and Feather rivers, to be expended under the direction of the Secretary of war, $250,000.

By an examination of the various items appropriated in the bill, it will be observed that the word "protection" was used *ex industria* in order to authorize the Secretary of War to *protect* the rivers from mining débris as proposed in the report upon which the appropriation was made.

These Acts show that Congress has, to the extent of its power, legalized the use of the navigable streams as outlets for mining débris. No other reasonable construction can be maintained.

The Act of June, 1880, above set forth, providing for surveys and examinations to prevent further injury to the navigation of the Sacramento

river from mining débris, was passed but little over a year before the commencement of this suit. The examination of Col. Mendell was made pending this litigation. The final appropriation, to carry out the provisions of his report, was made after the decision of this case.

It will be conceded that at the time of the passage of these Acts and this appropriation, Congress must have been fully advised as to the condition of the navigation of the Sacramento river. It had the whole subject under consideration, with ample power to protect the rivers from mining débris, by prohibiting the discharge of such débris into the streams.

But Congress continued its well-known policy to foster and encourage the working of gold mines and the production of gold, and made the appropriation for the protection of the rivers according to the report of Colonel Mendell before it.

Action of the State.

Without an enabling Act, a Constitution for California was framed and adopted in 1849, and the first Legislature of the State met in December of that year, and its government was fully organized.

On the 13th of April, 1850, that Legislature passed "An Act for the better regulation of the mines and the government of foreign miners." (Stats. 1850, p. 221.)

This Act declares:

§ 1. No person who is not a native or natural born citizen of the United States, or who may not have become a citizen under the Treaty of Guadalupe Hidalgo (all native California Indians excepted), shall be permitted to mine in any part of this State, without having first obtained a license so to do according to the provisions of this Act.

§ 2. The Governor shall appoint a Collector of Licenses to foreign miners for each of the mining counties, and for the county of San Francisco. * * * * * *

§ 4. It shall be the duty of the Comptroller to cause to be printed or engraved a sufficient number of licenses, which shall be numbered consecutively, and shall be in form following, to wit:

"Number ——— (date), A. B., a citizen of ———, "age —— years, complexion ———, is hereby licensed to work "in the mines of California for the period of thirty days."

The Comptroller shall countersign each of said licenses, and shall transfer them to the Treasurer, keeping an account of the number so transferred.

§ 6. Every person required by the first section of this Act to obtain a license to mine, shall apply to the Collector of Licenses to Foreign Miners, and take out a license to mine, for which he shall pay the sum of twenty dollars per month; and such foreigners may from time to time take out a new license, at the same rate per month, until the Governor shall issue his proclamation announcing the passage of a law by Congress, regulating the mines of precious metals in this State.

§ 9. Any foreigner who may obtain a license in conformity with the provisions of this Act, *shall be allowed to work the mines anywhere in this State*, under the same regulations as citizens of the United States.

The authorization of § 9 was certainly explicit.

In 1852 the Foreign Miners' License Act was passed, fixing the license at $3.00 per month. (Stats. 1852, p. 84.)

In 1853 the Act of 1852 was repealed, and another Act passed fixing the license at $4.00 per month, and providing summary process in case of refusal to pay. (Stats. 1853, p. 62.)

This Act was several times amended, but as amended continued in force until 1861, when this subject was incorporated in the general revenue Act. (Stats. 1861, p. 447, §§ 90 to 100.)

The Act of March 24, 1866 (Stats. 1865–6, p. 380), provides that all foreign miners' licenses shall be signed by the Comptroller personally, or by a clerk specially designated by him for that purpose, and with the official description, "License Clerk."

Under these Acts the State continued to issue licenses to foreign miners, and it is a part of the history of the State that in the years 1852 and 1853, in the county of El Dorado, the revenue derived from this source alone was sufficient for the support of the county government.

By the Practice Act of 1851, § 621, it was provided that:

> In actions respecting mining claims, proof shall be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim, and such customs, usages, or regulations, when not in conflict with the Constitution and laws of this State, shall govern the decision of the action.

This provision was reënacted in 1872, as § 748 of the Code of Civil Procedure.

In 1852 was passed the Act in relation to possessory actions, the first section of which provided that persons who had settled on occupied public lands for grazing or agriculture might maintain

actions for any interference with or injury done to their possession, with this proviso:

> That if the lands so occupied and possessed, contain mines of any of the precious metals, the possession or claim of the person or persons occupying the same for the purposes aforesaid, shall not preclude the working of such mines by any person or persons desiring so to do as fully and unreservedly as they might or could do had no possession or claim been made for grazing or agricultural purposes. (Stats. 1852, p. 158.)

By the Act, entitled "An Act to regulate the rights of the owners of mines," approved April 1, 1870, the Legislature declared that the owners of mines should have the right to acquire, by condemnation, the right of way over, across, through, or under, the mining claims, or *other* lands of other parties for roads and water-ditches to their mines, and for cuts, drains and tunnels from their mines; and dumping places for tailings; and provided the procedure for such condemnation, and designated the Court in which the proceedings should be had. (Stats. 1869–70, p. 569.)

In 1874 the Legislature, believing that the grant of the 16th and 36th sections, by the Act of Congress, included mineral as well as agricultural lands, passed an Act for the sale of "mineral lands belonging to the State," by which it fixed the price of such lands at $2.50 per acre, prescribed the forms of application, and the manner of referring contests as to character of land and the right to purchase, to the Courts for determination. Sections 6 and 7 of the Act provided:

§ 6. *All patents* issued by the State to any portion of any sixteenth or thirty-sixth section, shall be subject to any vested and accrued water rights, ditches and reservoirs, used in connection therewith, acquired by priority of possession under local customs and the decisions of the Courts; and, the right of way for the construction of ditches and canals, for mining and other purposes, over all the sixteenth and thirty-sixth sections owned by the State, is hereby granted and confirmed.

§ 7. After the passage of this Act, no patent shall be issued by the State for any of the lands described in this Act, upon which, at the time of the application therefor, there was and still is any actual *bona fide* mining claim, except to the person who is the owner of such mining claim, under local mining customs. * * * * * (Stats. 1873–4, p. 766.)

The Supreme Court of the State has very many times declared the effect of the legislation of the State, in respect to mining and water rights. From these we select a few.

In *Irwin* vs. *Phillips*, 5 Cal., 146, the Court say:

In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right, or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. * * *

So fully recognized have become these rights, that without any specific legislation conferring, or confirming them, they are alluded to and spoken of in various Acts of the Legislature, in the same manner as if they were rights which had been vested by the most distinct expression of the will of the lawmakers.

In *Conger* vs. *Weaver*, 6 Cal., 557, the Court say:

The State Government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them in some instances, and recognized them in all. * * * In the case of *Hicks* vs. *Bell*, 3 Cal., speaking of this State's ownership of her gold mines, this Court said:

"In her legislation upon this subject, she has established the "policy of permitting all who desire it to work her mines of "gold and silver, with or without conditions."

Yet there was not, at that time, nor has there been since, any Act of the Legislature, directly conferring the privilege of working the mines, except in cases of foreigners, who were required to obtain and pay for a license to do so.

In *Merced Mining Company* vs. *Fremont*, 7 Cal., 317, the Court say:

When we consider the current and the spirit of the legislation of both governments, taken in connection with the history and the known circumstances of the country, the conclusion is irresistible, that the mines are occupied and worked, with the clear assent and encouragement of both governments.

In *Hill* vs. *King*, 8 Cal., 338, Chief Justice Murray, speaking of the right to appropriate the waters of the streams for mining and other purposes, says:

The Court has based this right on the ground that the *legislation of the State* has given to every one, not only the privilege to work the "gold placers," but also to divert the streams for this and other purposes.

Most Significant Action of the State.

At its next session, after the passage of the *placer* mining Act of Congress of July 9, 1870, the State Legislature provided all necessary laws

in order that the mines might be drained and completely developed, and it authorized the exercise of the eminent domain for such purposes.

These laws are contained in the Code of Civil Procedure, title 7, part 3, secs 1237 to 1263.

This title went into effect April 4, 1872.

Code of Civil Procedure, sec. 1259.

Sec. 1238 provides as follows:

> Subject to the provisions of this title, the right of eminent domain may be exercised in behalf of the following public uses: * * *
>
> 5. Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines; also, outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of the different mines of any place for the flow, deposit or conduct of tailings or refuse matter from their several mines.

It must be conceded that the provisions of this law could only be carried into effect by the use of the navigable waters as the necessary outlets of mining débris. All the natural and artificial water courses upon which mines exist in California finally discharge into the navigable rivers, and the Legislature declared the right to use such natural and artificial water-courses for the flow and deposit of mining débris a public use.

In pursuance of the policy manifested by the eminent domain Act, the Legislature passed the Act of March 29, 1878, Subdivision 8 of Section 4 of which reads as follows:

The State Engineer shall also inquire into the relation which hydraulic mining bears to the navigation of the rivers, and to their carrying capacity; to inquire into the question of the flow of débris from mines into the water courses of the State, to ascertain the amount and value of agricultural lands and improvements which have been covered up or injured by the overflow or deposit of débris coming from the hydraulic and other mines in Sacramento Valley, *and* to *devise a plan where by the injuries caused thereby can be averted without interfering with the working of such mines.* (Statutes of 1877–8, p. 635.)

A most significant provision is also found in the New Constitution of California, adopted by the people in 1879.

The first clause of Section One of Article 14 of that Constitution declares that:

The use of all *water now appropriated*, or that may hereafter be appropriated, for sale, rental, or distribution, *is hereby declared to be a public use*, and subject to the regulation and control of the State, in the manner prescribed by law.

At the time of the adoption of this Constitution, all the water of the American river available for mining purposes was appropriated, sold and distributed to the different mines for the purpose of mining. The Convention had plenary power to prohibit hydraulic mining. It did not do so; on the contrary, it declared the very use of the appropriated water now complained of to be a public use.

Upon what theory did Congress and the State Legislature pass the above quoted laws, except that mining was a lawful industry? Is it possible to account for the legislation in question, upon the theory that mining is a public nuisance, and therefore a crime against the State?

If Congress, by the Acts of 1866 and 1870, did not intend to consent that the navigable streams might be used for the necessary drainage of mines, why did it not in these Acts prohibit the flow of mining débris into the navigable waters?

Again in 1880, Congress authorized the War Department to devise a system to prevent the further injury to the navigable waters of California from mining débris, without taking any action to prohibit hydraulic mining, or the further flow of mining débris into the rivers.

One sentence in that Act would have stopped the evil sought to be prevented. If the use of the navigable waters for the flow of mining débris was unlawful, why did the Legislature of this State, in 1872, pass the law of eminent domain, which could not be executed without such use?

Why did the Legislature, in 1878, require the State Engineer to devise a plan whereby the injuries caused by hydraulic and other mines could be averted *without interfering with the working of such mines*, if the mines were then being worked in an unlawful manner.

If hydraulic mining was a nuisance, why was it not interfered with?

Judge Temple substantially held that the State had no right of action by reason of its proprietary rights, or considered in its corporate capacity. He said:

> The acts which are said to be wrongful have certainly been so long tolerated, without objection, if they have not been encouraged, that no shadow of blame can possibly attach to those who have invested their money in it. If the question were in a legislative body, whether some law which had permitted it, and under the sanction of which it had grown into importance, should be repealed, the suggestion would be irresistible. So it would be in an action, perhaps, where it involved only the proprietary rights of the government, or *any interest of the government simply considered* in its corporate capacity. (Trans., fol. 226.)

The right of navigation is simply a right of the government in its corporate capacity; nothing more, nothing less; and it is only the right of navigation that we are now considering. Injuries to the lands of individuals cannot be considered in this action, as we have already shown.

In this action, the State is complaining of and seeking to prohibit hydraulic mining, while its Legislature has uniformly encouraged such mining, and passed all laws necessary for its prosecution. Are not these laws binding on the State?

It may be that these laws have not affected the right of any person to protect his property from injury by hydraulic mining, if he duly pursues his legal remedy; but certainly, so far as the right of the State is concerned, the legislation in question is sufficient to establish the fact that mining is lawful, and has been prosecuted in a lawful manner.

Is the Act Authorizing the Exercise of the Eminent Domain for Mining Purposes Constitutional?

It has been suggested that Sub. 5 of Sec. 1238 of the Code of Civil Procedure has been declared unconstitutional in the case of *Consolidated Channel Co.* vs. *C. P. R. R.*, 51 Cal., 269.

That case was a proceeding to condemn a right of way for drainage of a mining claim situated in Nevada county. The lands sought to be condemned were in the mining region of the State.

The mineral lands having been reserved from sale by the Pre-emption Act of March 3, 1853, the public surveys were not extended over the mineral section of the State (which included the land in question*) until the passage of the Mining Acts of 1866 and 1870.

By these latter Acts all the mineral and agricultural lands in the mineral section of the State were sold subject to the right of the State to pass all necessary laws for draining and working mines. The railroad grants were also subject to the same conditions.

Broder vs. *Water Co.*, 101 U. S., 274.

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* The first survey in Nevada county was Township 16 north of Range 7 east, M. D. M., made in 1867, and approved August, 1867. The property in controversy in the Con. Channel case is situate in the above Township—See Records of U. S. Surveyor's General's office for California.

If these facts had been brought to the attention of the Court, the decision must have been otherwise. But the decision as it stands does not declare the law in question unconstitutional.

The exact question considered in the case was whether a single mine owner could condemn a way for a flume and place of deposit for the tailings from his mine.

The Court, in deciding this case, said :

> It is clear, from the averment of the complaint, that the object sought is the appropriation of the private property of the defendants to the private use of the plaintiff. The proposed flume is to be constructed solely for the purpose of advantageously and profitably washing and mining plaintiffs' ground. It is not even pretended that any person other than the plaintiff will derive any benefit whatever from the structure when completed. No public use can possibly be subserved by it. It is a private enterprise, to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the Constitution which permits the taking of private property for a public use after just compensation made. (51 Cal., 271–2.)

We think it would perhaps have been more accurate if the Court had suggested that the case was not within the class of public uses enumerated in the Statute considered, which was the following clause of Subdivision 5 of Section 1238 :

> Roads, tunnels, ditches, flumes, pipes and dumping places for working *mines* ; also, outlets, natural or otherwise, for the flow, deposit or conduct of tailings or refuse matter from the mines.

It is not at all clear that this clause was intended to confer the right of condemnation upon a single individual for a private purpose. "Mines,"

"outlets," etc., are used in the plural, and the Court might very properly have confined the operation of the statute to the cases expressed therein—where a number of mines were interested.

The Court does not quote or consider the remaining clause of Subdivision 5, which is as follows:

> Also an occupancy in *common* by the owners or possessors of different *mines* of any place, for the flow, deposit or conduct of tailings or refuse matter from their *several mines*.

This is certainly the most important clause of Subdivision 5, and provides for a different class of cases from those which might arise under the clause quoted and considered by the Court. A case arising under the last clause must necessarily involve the interests of a large number of persons, and could not be subject to the objections made by the Court in its opinion.

It is obvious that the statement in the opinion of the Court, that the demurrer raises the question of the constitutionality of Subdivision 5 of Section 1238, was not carefully or accurately made, and cannot affect the manifest scope of the question decided.

The Court did decide that a single corporation owning a single mine could not condemn private property for an outlet for such mine; but the Court did not decide the question whether or not

the miners owning the mines on the water-sheds of the Yuba, Feather and American rivers could condemn a place for the flow and deposit of their mining tailings.

If the first clause of Subdivision 5 does authorize the condemnation of a right of way for a single mine, then the Court decided such clause unconstitutional to that extent, and no further. But such a decision could not be quoted as authority where a large number of persons owning a large number of mines were seeking to condemn a place for the flow and deposit of their mining débris under a different clause of the Statute.

The question, then, is squarely presented. Is the Statute, which authorizes the miners on the water-sheds of the Feather, Yuba and American rivers to condemn a place in common for the flow and deposit of their mining débris, constitutional? In other words, is the mining on the water-sheds of those rivers such a public use as to authorize the condemnation of such common outlets for the flow and deposit of mining tailings as are necessary for the working of the mines?

No question analogous to the one under consideration was decided in the Con. Channel case; on the contrary, the decision in that case affirmed the doctrine of the Stockton and Visalia R. R. case, 41 Cal., 147, and specially refers to that case for a full discussion of the question, "What is a

public use?" In the Stockton case, the Court arrived at the conclusion that any Statute declaring a thing a public use will not be held unconstitutional, *if the use so declared can possibly be public.*

Hand Gold Mining Co. vs. *Parker*, 59 Georgia, 419, is a case in point.

In that case the question of the power to condemn a way to construct a ditch and flume to a gold mine was under consideration. The Legislature had authorized a condemnation of private property for that purpose, and the question presented was the constitutionality of the law.

The Court say :

> Was the grant of the right of way to the defendant to construct its ditch or canal for the purposes therein expressed made for the exclusive use and benefit of the defendant, or was the main inducement in making the grant by the General Assembly the public good, to wit, the increased production of gold for the use of the public. Gold and silver are the constitutional currency of the country, and to facilitate the production of gold from the mines in which it is imbedded, for the use of the public, is for the public good, though done through the medium of a corporation or individual enterprise. The increased production of gold from the mines of Lumpkin county, by the means provided for in the defendants' charter, must necessarily be for the public good, inasmuch as it will increase for the use of the public a safe, sound, constitutional, circulating medium, which is of vital importance to the permanent welfare and prosperity of the people of the State of Georgia as well as of the people of the United States. (59 Ga., 424.)

In *Bankhead* vs. *Brown*, 25 Iowa, 547, the question of the condemnation of a right of way to a coal mine was presented. The Court say :

> So the State may provide that a public way may be established to coal or other mines. Mineral wealth is not to be locked up for ever, beyond the power of the Legislature to

force a public passage to the mines to enable the owner to get it to market, and others to reach the mines in order to buy it there.

New Central Coal Co. vs. *George's Creek Coal and Iron Co.*, 37 Maryland, 537, is another case in point.

A corporation had been organized by statute to construct a railroad to a coal mine, and for that purpose to condemn private property for a right of way. It was objected that the use was private. The Court, in overruling the objection, say :

To furnish the requisite facilities for the construction of railroads for the successful operation of the mines is therefore, in some sense a public necessity, and that being so the use of the ways for such roads may as well be said to be public, and therefore the right of condemnation exists. That the right should be placed in the hands and under the control of a private corporation, detracts nothing from the public nature of the use. (37 Md., 562.)

The Court also cites, with approval, *Bankhead* vs. *Brown*, above quoted from.

The three cases last above referred to are very strong when we consider the fact that in no one of the States in which they were decided, was the mining interest in question so important as gold mining in California must be conceded to be.

These decisions are in entire harmony with the doctrine laid down in the Stockton and Visalia Railroad case, which is the leading case in California on the subject of the power of the Legislature to declare what is a public use.

In treating of this subject, Mills, on Eminent Domain, says:

Akin to the Acts which allow condemnation for mill sites are those Acts for the encouragement of mines. In mining districts valuable interests may remain undeveloped on account of the obstinacy of owners who refuse to allow their lands to be used for the necessary tunnels, ditches, flumes, pipes, and dumping places. Roads may be necessary to reach the mines and to transport the wood, lumber, and materials necessary for carrying on the business of mining. Such statutes have been passed in California and Nevada. In the former State they are held not to justify the condemnation of land for the use of an *individual* or single corporation, while in the latter the Act does not seem to confine the exercise to cases where the roads or appliances would or could be used by more than one individual. There is no doubt that the public may establish a public road to mines, as it is important to the public that mineral wealth should be developed. In Pennsylvania and Maryland similar statutes are passed for the development of mines, which will be considered hereafter under the head of Private Roads. Iron works have been suggested as a proper public use. In Georgia the condemnation of right of way over unoccupied lands, for the carriage of water necessarily used in gold mining, is recognized as legitimate.

Mills on Eminent Domain, Sec. 20.

The Legislature of Nevada, in 1875, passed an Act upon this subject, the first section of which is as follows:

The production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor.

Stats. of Nev., 1875, p. 111.

The statute further provided for the condemnation of easements and appurtenances for working mines, such as drainage, roads, dumping ground, and the like.

In the case of the *Dayton Mining Co.* vs. *Seawell*, 11 Nev., 394, the question of the constitutionality of this law was raised by an application to the Supreme Court for a mandamus to compel a District Judge to proceed to hear a petition filed under the provision of this Act for the condemnation of a road to a mine, who declined to act solely on the ground that the law was unconstitutional. The Supreme Court, in an elaborate and well-considered opinion, sustained the constitutionality of the Act, and ordered the mandamus. The authorities cited in the opinion fully sustain the conclusion arrived at by the Court.

Overman Silver Mining Co. vs. *Corcoran*, 15 Nev., 147, was an application to condemn a place for the location of a shaft to work a portion of the Comstock lode. The Court below ordered the condemnation, which judgment was affirmed by the Supreme Court. In its opinion, the Supreme Court, in considering the evil consequences that would result from holding the law unconstitutional, say:

> This case would then come within the category of cases which, as was said in *Dayton G. & S. M. Co.* vs. *Seawell*, were liable to happen, "that individuals, by securing a title to the barren lands adjacent to the mines, mills or works, have it within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capital is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities," and confirms the opinion there advanced, that "the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining." (15 Nev., 156.)

The term "public use" is flexible. Whether a use is public or private depends upon the circumstances and surroundings of each particular case.

The reason of the case and the settled practice of free governments must be our guides in determining what is or what is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide.

Cooley's Con. Lim., star p. 533.

Mill dams, to secure water-power to propel saw mills and grist mills in the early times, while the country was new, were held in several of the States to be such a public use as to authorize the condemnation of private property; but after the introduction of steam power, the reason for such use became much weaker as the necessity for water-power grew less.

Cooley's Con. Lim., 534.

Mills on Eminent Domain, Sec. 15.

Ryerson vs. *Brown*, 35 Mich., 333; S. C., 24; Am. Rep., 564.

Drains of marshes for the reclamation of land may be a public use; but the drainage of one man's farm simply to render it more valuable, would not be a public use, but simply a private undertaking.

Mills on Eminent Domain, Sec. 16.

If gold mining in California were an insignificant industry, in which the public to no considerable extent were interested, it would not constitute a public use. But the magnitude of the industry, the number of people engaged in it, and the benefits to the public derived from mining in California, places it as a public use beyond controversy.

The gold miners of California have advanced civilization more by the gold they have produced, than the product of the labor of ten times their number engaged in other pursuits anywhere on the globe.

Gold mines are confined to an insignificant portion of the earth's surface, and gold mining can only be pursued where the mines exist. The localities of this pursuit are fixed by nature, not selected by man. Mines must be worked where they are found, or not at all. The gold mines of California exceed in extent and richness all other known gold mines in the world. They must have outlets for drainage and flow of tailings, or not be worked. The natural water-courses are the only possible outlets.

Since, the decision in the Con. Channel case, Sub. 5 of Section 1238, has been fortified by the first clause of Section 1, Article 14, of the New Constitution, which declares :

The use of all water now appropriated, or that may hereafter be appropriated for sale, rental or distribution, *is hereby declared to be a public use*, and subject to the regulation and control of the State in the manner to be prescribed by law.

At the time of the adoption of this Constitution, all the water of the rivers available for mining purposes, was appropriated, sold and distributed to the different mines for the purpose of mining.

In view of this constitutional provision, can it be said that the use of the water so appropriated and sold or distributed is not a public use, and will any Court say that the law, which provides the only means by which such water can be used, is unconstitutional?

THE ATTORNEY-GENERAL CANNOT OBJECT IN THIS ACTION THAT THE LAW IS UNCONSTITUTIONAL, OR THAT NO PROCEEDINGS FOR CONDEMNATION OF PRIVATE PROPERTY HAVE BEEN HAD, IF SUCH BE THE FACT.

Town of Pierrepont vs. *Loveless et al.*, 72 N. Y., 211.

This was an action brought by the town of Pierrepont to recover damages for the destruction of a bridge across the Racket river in that town, alleged to have been occasioned by defendants' negligence in floating logs down the river. The Legislature had passed an Act declaring the

river a public highway, for the purpose of floating logs and lumber, and it was claimed that the Act was unconstitutional because no provision was made for compensation to riparian owners. The Court, said :

> It is claimed that this latter Act was unconstitutional, as it provided no compensation to riparian owners. But that objection can be set up only by such owners when their rights are interfered with. (72 N. Y., 216.)

Wellington et al., Petitioners, etc., 16 Pick., 87, is to the same effect. In delivering the opinion of the Court in that case, Chief Justice Shaw said :

> But whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected. *Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid ; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law, in the conclusion, that such act is not void, but voidable only ; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of, by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons, against the unwarranted exercise of legislative power, and to this extent only, therefore, are Courts of justice called on to interpose. (16 Pick., 96.)

It follows from what has already been said that the defendant is engaged in a lawful business, sanctioned by the legislation of Congress and declared to be a public use by the Legislature of

the State, and that the acts complained of do not constitute a nuisance for which any action on the part of the State, either civil or criminal, can be maintained.

III.

The Findings do Not Sustain the Judgment, Because they Show that Defendant Does Not Materially Contribute to the Alleged Nuisance.

The issue of fact in this case was whether the defendant had *materially* contributed to the evils complained of.

The Court, in passing upon this issue, finds that

> It is contended by the defendant that all the débris that it puts into the American river (save a small per cent.) remains permanently above Rice's bridge—a point about nine miles below Cañon creek—and no question in the case has been more minutely examined. (Trans., fol. 189.)

The Court then argues the question as to the probability of the material discharged from the defendant's mine being ultimately carried down to the valley section of the rivers, and concludes by saying:

> *Still I am unable to say that defendant's mine alone, without reference to the débris from other mines, materially contributes to the evils mentioned; or in other words if there were no mining operations save those of the defendant, I am not prepared to say that it would materially injure the valley lands or the navigation of the river. It is the aggregate of débris from all the mines which produces the injuries mentioned in these findings.* (Trans. fol. 200.)

The foregoing is either no finding upon the issue, or it is a finding that the contribution of the defendant to the evils mentioned was not material.

If the Court did not find that the contribution of the defendant was immaterial, then there is no finding on the issue, for the Court has not found that the contribution of the defendant was material. In that case the judgment must be reversed for want of a finding on a material issue.

Paulson vs. *Nunan*, 54 Cal., 123.
Byrnes vs. *Claffey*, 54 Cal., 155.
Glascock vs. *Ashman*, 52 Cal., 420.

But we submit that the finding is that the contribution of the defendant was immaterial.

In *Montifiori* vs. *Engels*, 3 Cal., 431, where a referee reported that he was unable to find the value of R's interest in a cargo, it was held that it was a finding that R had no interest.

There is no other finding except the one above quoted, showing what amount, if any, of the tailings discharged from defendant's mine reaches the Sacramento river. The findings, taken as a whole, show that the amount is inconsequential. Although there has been 36 years of mining and farming on the Feather, Yuba, Bear and American rivers and their tributaries, navigation on the Sacramento river is only injured to the extent of preventing deep-draught boats reaching the city of

Sacramento in times of low water. The river is still navigated at all seasons of the year, and freight is cheaper now than ever before. The great mass of débris in the Sacramento, as appears by the findings, has come from the tributaries of that river *above the mouth of the American.* The Court finds that no such state of things exists on the American river as is seen on the Bear, Yuba and Feather rivers. (Trans., folio 201.)

The defendant has contributed only a very small part, if any, to the deposits which have been sent down the American river.

The Court finds, that from Cañon Creek alone, 67,000,000 cubic yards of material had been discharged into the North Fork of the American river before the commencement of work by the defendant in its present pit (Trans., folio 191), where the defendant had been mining for about eight years prior to the commencement of this suit. The Court also finds that large quantities of material from the Iowa Hill mines have been placed in the section of the river where the débris from defendant's mine was deposited, and that "on the American river and its tributaries a vast "amount of mining was done in early times, and "up to the present time a great deal is being done "beside that of the defendant." (Trans., fol. 199.)

When we take into account the vast amount of light material washed off in early times; the amount of mining now being done within the water-shed of the Sacramento, and the accumulation from farming, and erosion from other causes, we must conclude that the amount discharged into the stream by defendant is most insignificant. And when we take into consideration the further fact that most of the material discharged from defendant's mine is coarse gravel, cobbles and boulders, which, if moved at all, must take many years before any part of it could reach the valley, the injury to navigation from defendant's mining operations must be held too remote to warrant judicial interference. Well might the learned Judge say that he was unable to find that the contribution of the defendant was material.

The contribution to the nuisance must be material, or no action will lie. The word "material" has a well-defined signification in legal proceedings. "Materiality" is defined by Bouvier as follows:

> The property of substantial importance or influence, especially as distinguished from formal requirements. Capability of properly influencing the result of the trial.

It is only the "material" allegations in a complaint that a defendant is required to answer. Immaterial matters are disregarded.

> A material allegation in a pleading is one essential to the claim or defence, and which could not be stricken from the pleading without leaving it insufficient. C. C. P, Sec. 463.

In *Green* vs. *Palmer*, 15 Cal., on page 116, Judge Field states the rule for testing the materiality of an allegation in a pleading as follows:

> The following question will determine in every case whether an allegation be material: Can it be made the subject of a material issue? In other words, if it be denied, will the failure to prove it decide the case in whole or in part? If it will not, then the fact alleged is not material, and is not one of those which constitute the cause of action, defence or reply.

It will hardly be contended that the complaint here would state a cause of action if it alleged that the nuisance complained of resulted from the union of the aggregate of débris discharged into the stream by a great number of miners (including the defendant), acting separately and independently, *but that the defendant did not contribute materially to the injury complained of.*

The learned counsel seem to regard such an allegation as insufficient; for they allege in the complaint in this case that the defendant had largely and *materially* added and contributed to the evils mentioned.

In cases of nuisance, the question of materiality of the injury is the essential question submitted to the jury on the trial of an action at law, and the same question must be determined by a court of equity.

* *Queen* vs. *Russell*, 77 Eng. Law Rep., 3 E. & B., 942, was an indictment for a nuisance caused by an obstruction in a harbor. The Judge who tried the case at *nisi prius* asked the jury :

> Whether they thought the embankment would prove a material nuisance, directing them, in that case, to find a verdict of guilty, adding that, if they thought the nuisance was so slight, rare and uncertain that the defendant might not be made criminally liable for it, they should acquit him.

The jury said that they considered the embankment, although a nuisance, was not sufficiently so to render the defendant criminally liable. The learned Judge then directed a verdict of not guilty.

A rule *nisi* for a new trial was obtained on the ground of misdirection by the Judge, and on the argument of the motion, counsel contended that if there was a nuisance at all the defendant should have been found guilty, saying :

> There cannot be a nuisance so slight as that the party committing it is not to be held criminally liable, though *there may be an obstruction so slight as not to create a nuisance.*

All the Judges agreed that counsel had stated the rule of law correctly, but it was held by. Coleridge and Compton, Judges, and Lord Campbell, C. J., that the charge was to be understood as meaning not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a

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* This case must not be confounded with *Rex* vs. *Russell*, 6 B. & C., 566, which was overruled in *Rex* vs. *Ward*, 4 Ad. & E., 384.

nuisance, and that the jury must be understood as finding that the obstruction in question was so insignificant; and that, therefore, there was not a misdirection warranting a new trial.

Rex vs. *Tindall*, 33 Eng. Com. Law. Rep., 6 Adolph & Ellis, 143, was an indictment for a nuisance, by erecting and continuing piles and planking in a harbor, and thereby obstructing it and rendering it insecure. Special verdict, that by the defendant's works the harbor is in some extreme cases rendered less secure. *Held*, that the fendant was not responsible criminally for consequences so slight, uncertain and rare; and that a verdict of not guilty must be entered.

The best model instruction to a jury that we have been able to find is in the *St. Helena Smelting Co.* vs. *Tipping*, House of Lords' Cases, Vol. 11, p. 642. It was an action for damages for injury to plaintiff's trees and shrubbery from defendant's copper smelting works.

The learned Judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbors; that there was no prescriptive right in this case; that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapors, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that

in counties where great works had been erected and carried on, persons must not stand on their extreme rights and bring actions in respect to every matter of annoyance, for if so, the business of the whole country would be seriously interfered with.

Verdict and judgment were entered for plaintiff. Motion for new trial refused. Case appealed to Exchequer Chamber, and affirmed.

The directions of the Court at *nisi prius* were submitted by the Lord Chancellor to the Judges, who unanimously answered that the directions given by the Judge to the jury were correct, and that a new trial ought not to be granted, and said: "So "far as the experience of all of us goes, the direc- "tions are such as have been given in these cases "for the last twenty years."

It will be observed that the element of materiality of the injury caused by the act of the defendant was recognized as essential in each of the foregoing cases; that slight, inappreciable and immaterial injuries are not actionable, and that, according to the principle of these decisions, the defendant in the case at bar is entitled to judgment on the findings.

Wheeler vs. *City of Worcester*, 10 Allen, 591, was an action to recover damages for various obstructions in the stream, which dammed up the water thereof, to the injury of plaintiff's buildings, etc. A large number of findings were made by Auditors, which were to be conclusive as to the

facts, subject to the opinion of the Court as to the questions of law. Among these findings there was one which presented the question now under consideration.

The Auditors said :

> We do not find that their (the sewers) deposits have been so considerable as to form any substantial part of the causes of the flooding complained of, or to exert any appreciable effect upon the plaintiff. * * * * *
>
> The chief and by far the most efficient cause of this difficulty arises from the acts and neglects of riparian occupants, and parties other than the city, who make the brook a receptacle for all kinds of waste material.

The Court, in commenting upon the finding first above recited, said :

> The report finds that the deposits from the underground sewers have contributed in some manner to the fllling up of the brook, but that the sediment carried by them into it is less in amount and less injurious in kind than would have been carried in from the surface by the same water, if the sewers had not been built; and further, that these deposits have not been sufficient to exert any *appreciable effect* on the plaintiff, and this seems to dispose of this cause of complaint upon *two good grounds.*

Thus the Court held that the fact that the deposits of the defendant did not exert any appreciable effect on the plaintiff's property, was a good defense.

Webster defines "appreciable:"

> Capable of being appreciated or duly estimated.

And he defines "immaterial:"

> Of no essential consequence, without weight or significance, unimportant.

"*The law disregards trifles.*" C. C., Sec. 3533.

There is another consideration in this case which seems conclusive of the point under consideration.

It is conceded that mining is a lawful industry; that quartz and drift mining may be prosecuted, and the débris from that source may be lawfully discharged into the rivers. The Court says:

> Counsel denied that there was any intention to assail the prosecution of drift, seam or quartz mining; there was no material injury from that source. (Fol. 239.)

Mr. Cadwalader, in his printed argument in the Court below (page 13), said:

> Yet our distinguished adversaries say this great mining industry must be suffered to proceed, and that we must not stop the mines. They say, we know what you are after, and attribute to us an ulterior purpose; declare we propose to stop all mines; that we propose to stop the quartz mines and the drift mines. Are we going to stop the quartz mines? Are we going to stop the drift mines? If there is any way that an assurance could be sent to the quartz miners and to the drift miners of the Sierra Nevada Mountains, I would like to know it. I would like to know how we could assure them that the people of this valley will not interfere with them. We would be glad to give them such an assurance. We would be glad to give them a guarantee that quartz mining, the mining in hard rock, and drift mining by shaft and cars and carts, should go on without fear or molestation from us. But I suppose this false pretence is simply an exigency in their case, to enable them to obtain a little more influence than they otherwise would be able to exert, by frightening the quartz miners and the drift miners into co-operation with them—by attributing such atrocious intentions to the people of the valley. To frighten them, I repeat, by imputing to the people in the valley, the farmers who are tilling the soil and the lot owners in the cities, views which have never been held by them, and which they never have intended to hold.

If it be true that any débris at all may be lawfully discharged into the rivers, as conceded by

the counsel for plaintiff, and held by the Court below, by what rule can we determine the amount which may be so discharged from any one mine? Would it not be necessary in every case to submit to the Court or jury substantially the same question that was submitted in the cases above cited, to wit: Has the defendant *materially* contributed to the injuries complained of? and would not a negative answer in such a case entitle the defendant to judgment?

IV.

THE DEFENDANT CANNOT BE HELD LIABLE AS A JOINT TORTFEASOR WITH OTHER MINERS, AND THEREFORE BE ENJOINED BY REASON OF THE FACT THAT THE AGGREGATE DÉBRIS DEPOSITS CONSTITUTE A NUISANCE. DEFENDANT IS ONLY LIABLE, IF LIABLE AT ALL, FOR ITS INDIVIDUAL CONTRIBUTION TO SUCH DEPOSITS.

It is not pretended that the acts of the defendant alone constitute a nuisance, or will hereafter injure the navigation of the Sacramento river or the adjacent lands.

It is not alleged in the complaint, neither is it found by the Court, that any injuries will result from the acts of the defendant alone. The allegation in the complaint as to threatened injuries is as follows:

That if the wrongful acts of the defendant and others above complained of are continued, the beds and channels of the lower portion of said American river and the Sacramento river, below the mouth of the American, will very soon be so filled and choked up by tailings from defendant's and other hydraulic mines, that said rivers will be turned from their natural beds, etc. (Trans. fol. 36.)

We do not contend that the fact that others are engaged in similar acts is any justification for the defendant, but we do maintain that the wrongful acts of others cannot create a cause of action against the defendant, unless all the miners and others discharging débris into the Sacramento river and its affluents are joint tortfeasors.

Counsel in the argument contended otherwise, and for illustration inquired if a manufacturing establishment which occasioned smoke and noxious vapors, to the injury of the surrounding neighborhood, could justify, on the ground that others were doing the same or similar acts. We answer no; but we say that any one of several parties engaged in a business which occasioned such smoke or noxious vapors, might justify on the ground that his individual acts did not materially contribute to the evils complained of. If the rule were otherwise, any householder using fire for domestic purposes might be enjoined, if the smoke from his chimney commingled with the smoke of a manufacturing establishment which created a nuisance. Can it be maintained that in such a case the householder could not justify on the ground

that what he did was lawful, and that his contribution to the nuisance was immaterial?

May not a farmer in El Dorado, or a quartz miner in Sierra, charged with contributing, with other miners and farmers on the affluents of the Sacramento river, to the impairment of the navigation of that river, defend by showing that he is engaged in a lawful industry; that his farm or his quartz mine does not materially contribute to the alleged nuisance; and would it not be necessary, before such quartz miner or farmer could be held liable in any action, to show that his acts were unlawful, and that his contribution to the nuisance was material?

Little Schuylkill Navigation Co. vs. *Richards, Adm'r*, 57 Penn. St., 142, is a case where the facts are analogous to the case at bar, and covers our contention.

The facts are so well stated by Judge Agnew, in delivering the opinion of the Court, and the case is so instructive, that we feel justified in quoting at length from the decision as follows:

The plaintiff's intestate was the owner of a dam and water power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with the coal dirt, washed down by the stream from the mines above, of several owners, upon Little Schuylkill, Panther Creek and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendants below with the whole injury caused by the filling up of his basin. The substance of the charge and answers to points was, that if at the time the defendants were engaged in throwing the coal

dirt into the river, about ten miles above the dam, the same thing was being done at the other collieries, and the defendants knew of this, they were liable for the combined results of all the series of deposits of dirt from the mines above from 1851 till 1858. The aspects of the case were varied, by deposits being made on and along the banks of the streams, which were carried away by ordinary rains and freshets; but the above is the most direct statement of the injury alleged, and is taken therefore as the test of the principle laid down by the Court. The doctrine of the learned Judge is somewhat novel, though the case itself is new; but, if correct, is well calculated to alarm all riparian owners, who may find themselves, by a slight negligence overwhelmed by others in gigantic ruin. It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt, and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate, and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do. This is bad logic and hard law.

Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: *Russell* vs. *Tomlinson et al.*, 2 Conn., 206; *Adams* vs. *Hall*, 2 Vermont, 9; *Van Steinberg* vs. *Tobias*, 17 Wend., 562; *Buddington* vs. *Sherer*, 20 Pickering, 477; *Auchmutz* vs. *Haen*, 1 Denio, 495; *Partenheimer* vs. *Van Order*, 20 Barb., 479. (57 Penn. St. Rep., p. 146.)

Judge Cooley endorses the principle of this decision, and refers to it as authority, as follows:

So it is a nuisance if a riparian proprietor shall cast into the stream, earth, sand, the refuse of his business, or other things which by the flowing water are carried and deposited upon the land of a proprietor below. The tort here consists in the *act of committing the rubbish to the stream.* The deposit upon the land below is only the consequence from which a cause of action in favor of a particular individual arises.

Cooley on Torts, p. 569.

Chipman vs. *Palmer*, 77 N. Y., 51, is a case where the Court held that the defendant could only be held responsible for his individual acts in discharging débris into the stream. The facts were precisely analogous to the case at bar. The Court, said:

The right of the plaintiff to recover of the defendant all damages which he had sustained by reason of the nuisance I think cannot be maintained. The injury was not caused by the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewerage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a

consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of and without any regard to the act of others. The defendant's act, being several when it was committed, cannot be made joint, because of the consequences which followed in connection with others who had done the same or a similar act. It is true that it is difficult to separate the injury; but that furnishes no reason why one *tortfeasor* should be liable for the act of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution or to adjust the amount among the different parties. So also proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others, who severally and independently may have contributed to the injury. Such a rule cannot be upheld upon any sound principle of law. The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one *tortfeasor* should be liable for the acts of others with whom he is not acting in concert. (77 N. Y., pp. 53–4.)

This Court has also decided this same question in *Keyes* vs. *Little York*, 53 Cal., 720, in an elaborate and well considered opinion. Several mining companies (acting separately and independently, each upon its own land, discharging débris into the stream, which was carried down by the water and commingled a long distance below, causing the evils complained of,) were joined in one action. The complaint was demurred to for misjoinder of parties.

The Court sustained the demurrer, and in its opinion, said:

If a nuisance was created hy the exposure of the dumps to the action of the waters of Bear River and its tributaries, a nuisance was committed by each of the defendants, when he—disconnected from the others—made or threatened such de-

posit; or, if it be said that the matter of the *reasonable use* of the stream can enter into the inquiry, there could be no nuisance by any of the defendants who had made only a reasonable use. In either view of the case, there is a misjoinder of parties defendant. The bare statement would seem to prove the proposition, since the very essence of the objection of misjoinder of a defendant with others is that he is not connected with or affected by the single cause of action, if there is but one, or that he is not connected with or affected by one or more of several separate and distinct causes of action, if several are alleged. If any one of these defendants were liable to be enjoined, he could have been enjoined in a separate suit, the subject matter of such suit being the alleged threatened wrong. If any one of the defendants is not liable to be enjoined in a separate suit, he cannot be made liable in an action like the present; for there is no principle of equity which would make a man responsible for a wrong which he has neither done nor threatened, merely by joining him with other defendants who may independently have threatened a similar wrong. (53 Cal., 731.)

See, also, *Sellick* vs. *Hall*, 47 Conn., 260.

The same doctrine is declared to be the law of this State in both the Civil and Penal Codes. Sec. 1848, in each of those Codes, reads as follows:

The rights of a party cannot be prejudiced by the declaration, act or omission of another, except by virtue of a particular relation between them.

The cases above cited are precisely parallel to the case at bar. Defendants in those cases acted separately and independently of each other, at different times and places, and the injury was the result of a union of consequences, and the liability was only several. No authority can be found for holding the defendants jointly liable in a case of this class. But there is another class of cases

where the wrongful acts are concurrent, *and the injury is the direct result of such concurrent acts*, in which the defendants are held both jointly and severally liable. The two classes of cases must not be confounded. Some confusion has arisen from failing to observe this distinction.

We will now examine the cases where Courts, by failing to observe this distinction, have used expressions, although mere *dicta*, which it may be proper to explain.

Woodruff vs. *North Bloomfield*, 8 Sawyer, 628, was a case where the defendants were only severally liable. The injury complained of was the result of the acts of several mining companies on the Yuba river, acting separately and independently of each other, discharging débris into the stream, which was carried down and commingled together, before it was deposited upon complainant's land. The bill was demurred to, for misjoinder of defendants. The Court overruled the demurrer on two grounds; first, that the injury resulted from the combined débris from the several mines, and the defendants might be joined for the purposes of equitable jurisdiction; and secondly, for the purpose of avoiding multiplicity of suits.

The question whether the defendants were jointly liable at law was not raised or decided; neither was the question presented or passed upon

whether or not the liability of any one of the defendants was increased either at law or in equity by reason of the acts of the other defendants and other miners discharging débris into the streams. *Thorpe* vs. *Brumfitt*, Law Rep., 8 Ch. App., 650, and *Hillman* vs. *Newington*, 57 Cal., 56, were cited in the opinion. The Court seemed to intimate that these cases furnish authority for saying that the defendants in *Woodruff* vs. *North Bloomfield* might be jointly liable; but these cases are not authority for any such doctrine, as we shall hereafter show. In deciding the Woodruff case, the Court said:

> In *Thorpe* vs. *Brumfitt*, 8 L. R. Ch. Appeals, 656, a bill was supported against several parties acting individually, and severally, in blocking up the passage to an inn, by loading and unloading wagons in it, in the prosecution of their several callings. Lord Justice James said: "Then it was said, that the "plaintiff alleges an obstruction, caused by several persons act- "ing independently of each other, and does not show what "share each had in causing it. It is probably impossible for a "person in the plaintiff's position to show this. Nor do I "think it is necessary that he should show it. The amount of "obstruction caused by any one of them might not, if it stood "alone, be sufficient to give any ground of complaint, though "the amount caused by them all may be a serious injury. "Suppose one person leaves a wheelbarrow standing on a way, "that may cause no appreciable inconvenience; but if a hun- "dred do so, that may cause a serious inconvenience, which a "person entitled to use the way *has a right to prevent;* and it "is no defense to any one person among the hundred to say, "that what he does causes no damage to the complainant." A decree granting a perpetual injunction in the case was affirmed. In my judgment, the present case is a much stronger one for sustaining the bill. The nuisance in that case was not so clearly, a joint single effect of the acts of the defendants coöperating together as that in this. In that case what each one did, continued distinct and separate, and could be readily

ascertained, though the share of the damages might be indefinite. In this the deposits are commingled and indistinguishable, before the nuisance is committed, and the action affecting the nuisance is joint. (8 Saw., 631.)

The defendants in *Thorpe* vs. *Brumfitt* were *jointly* as well as severally liable, because the injury complained of was the *direct* result of their *concurrent* acts. It was therefore no defense for any defendant to say that his contribution to the aggregate injury was small, nor was it at all necessary for the plaintiff to show the exact contribution of each defendant to the injury. The only defense in such a case by any single defendant was to show that he contributed nothing to the injury, whereas in *Thorpe* vs. *Brumfitt*, the defendants all answered together, claiming the right to do the acts complained of, which amounted to a threat to continue such acts and was sufficient ground for granting an injunction. The remarks of Lord Justice James must be considered with reference to the case before him. He certainly did not intend to hold that any person had the right to leave a wheelbarrow or any other obstruction in a public way. A person leaving a wheelbarrow in a street would be guilty of a nuisance, if no others did the same or similar acts. Possibly no inconvenience or special damage would result to any one from the obstruction of one wheelbarrow, and in such case only nominal damages could be recovered in an action

for such obstruction; but if one hundred persons should concurrently obstruct a street by as many wheelbarrows, the actual or special damage resulting therefrom could be recovered from one, all or any of the hundred persons, and the plaintiff in such case would not be bound to show the share of such damage caused by any one of such persons. It is sufficient to show that he participated in or contributed to the injury; for, in cases of joint liability, any contribution, however small, to the injury complained of, will render the defendant so contributing, liable for the whole injury; while in cases of several liability, where a defendant is responsible only for his individual acts, it must be proven, in order to show a cause of action, that such individual acts contributed *materially* to the injuries complained of. The remarks of Lord Justice James were made with reference to the law of joint liability, and were therefore inapplicable to the facts in the Woodruff case, where the defendants could be held only severally liable.

The learned judge, in his opinion in the Woodruff case, commented as follows upon *Hillman* vs. *Newington*. He said:

I also regard the case (*Keyes* vs. *Little York*) as substantially overruled by the present Supreme Court in the subsequent case of *Hillman* vs. *Newington*, 57 Cal., 56. It is true, the case of Keyes was not mentioned by the Court in its opinion in the latter case; but it was the principal case cited, and relied on by counsel. The case of Keyes could not have been overlooked by the Court, and there does not appear to have been any

attempt to distinguish it; and it seems to me, to be utterly inconsistent with the decision in *Hillman* vs. *Newington*, and to have been, in effect, overruled by the latter case. The difference between these cases is only in circumstance, not in principle. The action in the latter case was for diversion of water by several defendants, each acting independently. It was both an action at law, for damages, by a party entitled to a specific amount of water, and also a suit in equity, to restrain the diversion complained of. The point most strongly pressed in the Supreme Court was the alleged misjoinder. The Court says: "Each of them (the defendants) diverts some of the "water. And the aggregate reduces the volume below the "amount to which the plaintiff is entitled, althongh the amouut "diverted by any one would not. It is quite evident, there-"fore, that without unity, or concert of action, no wrong could "be committed; and we think that in such a case, all who act "must be held to act jointly. * * * It does not seem to "us that the defendant's answer, that each one of them is act-"ing independently of every other one, shows that the wrong "complained of is not the result of their joint action; and if "it does not, the answer in that respect is insufficient to con-"stitute a defense." The judgment at law was modified so as to *apportion the damages and costs equally among the defendants*, and affirmed as to the injunction. Even the action *at law was thus sustained.* If in that case, 'all who act must be held to act jointly," and "the wrong complained of is the result of their joint action," I cannot perceive why, for the purpose of equitable jurisdiction, the same consequences should not follow in the Keyes case, and in the case now under consideration.

We think the learned judge was mistaken in holding that *Hillman* vs. *Newington* overruled *Keyes* vs. *Little York.* The Keyes case was cited by counsel. But this Court said: "The case *(Hillman* vs. *Newington)*, so far as we are advised, is *sui generis;* no parallel case is cited by either side." This was plainly to say that the decision in *Keyes* vs. *Little York* was not affected by the decision in *Hillman* vs. *Newington.* Certainly it was not overruled or doubted.

There are two good reasons why there was no misjoinder of defendants in *Hillman* vs. *Newington*, neither of which existed in the Keyes case. *First*—*Hillman* vs. *Newington* was a controversy as to the right of property in 1600 inches of water claimed by plaintiff. The defendants denied plaintiff's right, and each claimed an adverse right or interest in the water in controversy, and were properly joined as defendants under Sec. 379 of the Code of Civil Procedure. *Second*—The injury to plaintiff was the direct result of the concurrent acts of the defendants in taking water from the stream. If such acts had not been *concurrent*, no injury would have been done.

In the Keyes case there was no controversy as to any right of property between plaintiff and defendants, nor was it necessary that the acts complained of should be concurrent to produce the injury. On the contrary, the injury was the consequential result of the acts of the several defendants, each acting separately and independently, at different times and places, upon his own land, discharging débris into the stream, which was carried down and commingled together, a long distance below by the force of the water, and finally deposited upon plaintiff's land, producing the injury complained of.

Mr. Wood, in his work on Nuisances, assumed that *Thorpe* vs. *Brumfitt*, Law Rep., 8 Ch. App., 650, *supra*, was authority for the doctrine that

> The acts of several persons acting separately and without concert, and entirely independent of each other, may together constitute a nuisance when the acts of either one alone would not create it.
>
> Wood on Nuisance, Sec. 808.

This statement of Mr. Wood is not true as a general proposition of law. It is only true where the separate and independent acts of several persons are *concurrent*—the injury *direct* and the liability therefore joint.

It is absurd to say that where there is no joint liability, a cause of action can be created against a person by the acts of others. The defendant in the case at bar is no more responsible for the acts of other miners discharging débris into the stream than it is for the land slides which so frequently occur on the American river.

Woodyear vs. *Schafer*, 57 Maryland, 1, much relied on by counsel for the plaintiff, contains some unsound *dicta*. It was a bill in equity to restrain the defendant from discharging from his slaughter-house, blood and other animal refuse into a small stream, to the injury of the plaintiff, who was the owner of a mill on the stream below. A large number of slaughterhouses and other establishments were also situated on the stream

and contributed to the evils complained of, until the stench had become intolerable and produced sickness at plaintiff's mill. It was proved that blood flowed regularly into the stream from the defendant's slaughterhouse, though in comparatively small quantities; but this, in connection with the contributions of others, created serious injury to the plaintiff. There was no prescription, and the simple question was, had the defendant a right to pollute the stream with blood from his slaughterhouse to *any* extent when he could otherwise dispose of it without great inconvenience, and perhaps with profit, as suggested by the Court. The decision of the Court is substantially copied from Wood on Nuisances; that author being cited six times in the opinion as authority for the positions therein taken. The Court also quotes from *Thorpe* vs. *Brumfitt;* but the language so quoted had no application to the facts there under consideration. All that portion of the opinion which seems to intimate that one man can be made liable for the separate and independent acts of another, is mere *dicta*. The question of reasonable use was not involved in the Woodyear case, because the acts of the defendant were *prima facie* a nuisance. It was so held in the cases relied on by the Court in its opinion. Among the cases cited was *Attorney-General* vs. *Stewart*, 5 C. E. Green, 419, in which

it was held that allowing blood from slaughtered animals to run into a stream is *per se* a pollution. In such case an injunction is proper. The only question before the Court in the case of *Woodyear* vs. *Schafer* was, had the defendant a right to discharge any blood into the stream where he had no prescriptive right to do so, and where there was no necessity for such use of the stream. The defendant himself, by his individual act, had polluted the stream, for which pollution he could be enjoined, and it was outside of the case to discuss whether his liability might be increased by the separate and independent acts of others. Nothing that the Court said on that subject is authority. The failure of the Court to distinguish the case under consideration from *Thorpe* vs. *Brumfitt* shows that the *dicta* were made without reflection. The defendant discharging blood into the stream, under the circumstances stated in the opinion, was only liable for his own acts, whereas in *Thorpe* vs. *Brumfitt* the defendants, by their concurrent acts, blocked up the passage-way and were jointly as well as severally liable for the whole injury.

This Court was not misled by *Thorpe* vs. *Brumfitt;* but on the contrary, in *Keyes* vs. *Little York*, correctly stated the question determined in that case:

An examination of *Thorpe* vs. *Brumfitt*, Law Rep., Ch. App. cases, Vol. 8, shows that the parties all had a contract relation to each other, by reference to which their respective rights were to be determined; and, further, that no question of joinder was raised, but, on the contrary, the defendants all answered together, insisting that they all had a certain right of way to be exercised in a reasonable and proper manner. (53 Cal., 733.)

We have now considered all the cases which contain any *dicta* implying that a person acting separately and independently of all others may be rendered liable, or that his liability may be increased, on account of the acts of other persons, by reason of a union of consequences of the acts of the several parties. We have shown that *Woodruff* vs. *North Bloomfield Co.* and *Woodyear* vs. *Schafer* belong to the same class of cases as *Little Schuylkill Navigation Co.* vs. *Richards, Adm'r*, *Chipman* vs. *Palmer*, and *Keyes* vs. *Little York*, where the defendants were only severally liable to the extent of the injury committed by each, and no further.

We have also shown that *Thorpe* vs. *Brumfitt* and *Hillman* vs. *Newington* belong to that other class of cases where the acts are concurrent—the injury direct and the liability joint.

The reason for the distinction between the two classes of cases is, that *the character of the liability, whether joint or several, is fixed at the time the wrongful act is committed.*

In the one class of cases the wrongful acts are concurrent—*directly and jointly producing an injury*—hence the law fixes a *joint* as well as several liability to such acts.

In the other class, the wrongful acts are independent—not producing any direct joint injury—hence, the liability, being fixed at the times the different acts are committed and before any injury is produced, must be several only, and such liability remains several, although the injury is the subsequent and consequential result of the several independent acts.

Familiar illustrations of the former class are collisions resulting from the concurrent negligence of two railroad corporations; injuries resulting from an obstruction to a highway, by carts belonging to several different persons, as in the case of *Thorpe* vs. *Brumfitt*. In all such cases the liability is joint.

A familiar illustration of the latter class is where several land-owners discharge débris from their premises into a stream, which by the water is washed down and commingled, and the injury results from the union of débris so severally and separately discharged into the stream. In such a case each land owner is only severally liable—that is, liable for his individual contribution.

Woodruff vs. *North Bloomfield* belonged to this latter class.

Judge Cooley states the cases falling under the former class, where the parties are jointly liable, and cites many authorities. He says:

> That if the damage has resulted DIRECTLY from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, jointly or severally, for the injury. Thus, *if two persons wrongfully block up a street*, so that one is injured in attempting to pass them, neither of the culpable parties can excuse himself by showing the wrong of the other; for the injury is a natural and approximate result of his own act, under the then existing circumstances, and to excuse either would be to deny all remedy in the case of plain and palpable injury.

Cooley on Torts, pp. 78 and 79, and cases cited in note 1, p. 79.

We have already given several examples of the latter class, where the parties are only severally liable.

See *Chipman* vs. *Palmer*, 77 N. Y., 51.
Little Schuylkill Navigation Co. vs. *Richards*, 57 Penn., 142.
Keyes vs. *Little York*, 53 Cal., 724.

In *Chipman* vs. *Palmer*, the Court, after having decided that several persons discharging débris into a stream from their own land are not jointly liable by reason of the union of consequences, said:

> The authorities relied upon to sustain such a doctrine (joint liability) come far short of establishing any such rule, and have no application. (*Barrett* vs. *The Third Ave. R. R. Co.*, 45 N. Y., 628; *Webster* vs. *H. R. R. R. Co.*, 38 id., 260; *Sheridan* vs. *B. & N. R. R. Co.*, 36 id., 39; *Chapman* vs. *N. H. R. R. Co.*, 19 id., 341; *Colgrove* vs. *N. Y. & H. & N. Y. & N. H. R. R. Co.*, 20 id., 492; *Creed* vs. *Hartman*, 29 id., 591.) Each of the cases cited was disposed of upon a different principle.

They merely hold that where a *direct* personal injury is occasioned by the separate and concurring negligence of two parties at one and the same time, an action against one and all of them will lie. The distinction is plain between the cases last cited and one where the injury is *remote* from the act and *consequential*, and the result of separate acts of different parties at different times, without any association and independent of each other. (77 N. Y., p. 54.)

Professor Pomeroy, in his Remedies and Remedial Rights (Secs. 307–308), draws the same distinction between joint and several tort-feasors as that stated in the foregoing quotation. Sec. 307 and notes show the cases in which the acts are concurrent, the injuries direct and the liability joint. Sec. 308, and note 3, state the principle contended for in the case at bar; and the learned author cites *Keyes* vs. *Little York*, among other cases, to support his text.

The same distinction is also drawn in *Little Schuylhill Navigation Co.* vs. *Richards*, 57 Penn., 142, *supra*.

Hence it follows, that where no joint liability exists, no action can be maintained against a person for a nuisance, unless his individual acts materially contribute to such nuisance; and the rule is the same whether he is sued alone, or jointly with others, to avoid a multiplicity of suits.

It ought to be conceded that where no cause of action exists against a party, none can be created against him by his mere joinder as co-defendant

with others, or, where he is sued alone, by alleging or proving the acts of strangers.

The argument to sustain the proposition that an innocent man can be made guilty of a wrong by any change in the form of action, pleading or proceedings, is, by its mere statement, a *reductio ad absurdum.*

It must be conceded that in the case of a public nuisance, the test of liability must be the same whatever the form of action or number of parties.

No one can be held guilty of a public nuisance in a civil action unless his acts would subject him to indictment and punishment therefor.

Miss. Ry. Co. vs. *Ward*, 2 Black, 494–5.

The facts in this case strongly mark the injustice and absurdity of holding the defendant criminally or civilly liable for the independent and separate acts of others.

A vast amount of mining has been carried on for more than thirty years within the water shed of the Sacramento river, and during all that time deposits of débris from mining and other sources have been gradually accumulating in the rivers and upon the low lands adjacent thereto.

Mining on the American river has contributed but a small part of the deposits described in the complaint. The Feather, Yuba and Bear rivers

have furnished the greater part of these deposits. The Court says:

> That no such state of things exists there (on the American) as is seen in the Bear and Yuba, near their confluence with the Feather. Perhaps if it were not for that instructive lesson we should not be justified in anticipating all the evils which may yet flow from these constant accumulations. (Folios 200-201.)

Besides, the Court finds that there has been erosion from other causes, which has also contributed to these deposits, and that a defective levee system has greatly increased the alleged evils. These aggregate deposits, in connection with the defective levee system, constitute the alleged nuisance.

The extent of the liability of the defendant is simply overwhelming if it is jointly liable with all persons who have in any way contributed to the alleged nuisance. For, if the liability of every contributor is joint, and the nuisance exists, each miner upon the vast water shed of the Sacramento river, and also each farmer who has contributed to these deposits, is liable for all the damages occasioned by such nuisance.

It must follow that the defendant in the case at bar is only responsible for its individual acts, which, as we have already shown, do not constitute a nuisance, or a material contribution to the evils complained of. The defendant cannot therefore be enjoined.

V.

THE DEFENDANT HAS A RIGHT TO CONDUCT ITS MINING OPERATIONS, DISCHARGING INTO THE STREAM SO MUCH DÉBRIS AS IS NECESSARY FOR THAT PURPOSE, PROVIDED IT MAKES ONLY A REASONABLE USE OF THE STREAM. THIS DOCTRINE OF REASONABLE USE IS UNIVERSAL IN ALL CIVILIZED COUNTRIES.

The uses made of streams of running water by civilized man, have in all ages and in all countries, to a greater or less extent, polluted the waters and deposited débris in the beds and upon the banks of the same. Some industries occasion more pollution and a larger deposit than others. But the extent to which the waters may be polluted or débris deposited, where there is no prescriptive right, depends upon the measure or standard of reasonable use. No use has ever been regarded as unreasonable because it obstructed harbors or navigable rivers, if it was according to the necessities and customs of the country. The farming in the Mississippi Valley contributes large quantities of débris to the Mississippi river, obstructs navigation, injures land, and threatens cities with destruction; and millions are appropriated and expended annually to prevent and alleviate the evils resulting therefrom. Yet it would be a wild

fancy to suppose that there was any power in the government to stop farming in the Mississippi Valley, on the ground that it injured the navigation of the Mississippi or the adjacent lands. The Thames, in England, is so choked and fouled with débris that at times navigation is very much impeded, and would be entirely destroyed were not large amounts of money annually expended in dredging it. The Government of the United States makes large appropriations annually for dredging the Hudson river and the harbor at New York, to relieve navigation from the evils of débris from sewerage and other sources. The same is true of every navigable river and harbor where the country is populated and civilized society exists, and no government has ever assumed, or can assume, to stop the reasonable use of the streams for the purposes of civilization, because navigation is obstructed thereby. The doctrine of reasonable use is the growth of necessity, and must be applied in any given case to the customs, usages and necessities of the country. It is especially applicable to the mining region of California, where the streams have been devoted for the last 34 years—a period anti-dating the admission of the State—to the use of mining; which industry can only be prosecuted by discharging a considerable quantity of débris into the streams.

The findings show that the lighter material has already been washed from the surface, and that no mining can be done by the defendant without the discharge of some of the material prohibited by the injunction granted in the Court below. It is true that the defendant may move to dissolve the injunction when it has made provision for restraining the heavier material, but no state of facts is determined in the judgment under which the injunction will be dissolved. The judgment does not permit the defendant, when it has constructed proper works for restraining the heavier material, to proceed with its mining. The injunction, for all practical purposes, is absolute. Defendant cannot even work its mine by drifting. There have been thirty-four years of mining, and vast deposits of débris are in the river. No prudent man would undertake to spend a large amount of money to impound all this débris upon the naked possibility that an unprejudiced Judge, when this work had been accomplished, would allow him to continue mining.

The principle involved is, that a Court may, in any case, absolutely enjoin the least use of the stream for mining purposes. We maintain, on the contrary, that the defendant is entitled to a reasonable use of the streams for mining purposes, and no action can be maintained against it so long as it

makes only a reasonable use; and that any injury to others resulting from such use is *damnum absque injuria.*

It is conceded in this case, that quartz and drift mining may be lawfully prosecuted. Such mining involves the use of the streams as outlets for mining dêbris. And if some mining may be done, by what standard, except that of reasonable use, can we determine how much may be lawfully done? If the defendant may work its mine by the drifting process, why is it enjoined from allowing any sand, clay, or other débris, to flow into the stream from its mine?

On the question of reasonable use, we call particular attention to the case of *Merrifield* vs. *Worcester*, 110 Mass., 216, because it declares with great accuracy the common law rule, and also the rule adopted in the United States with regard to the pollution of water by sewerage, and because the recent English decisions upon that subject are all made under special statutes, and do not declare the general principle independent of such statutes.

It was an action for damages brought by a riparian proprietor against the city of Worcester, for the adulteration of a stream by sewerage. The Court, in deciding the case, said:

The right, of which the plaintiff alleges a violation, is not that of acquired property in possession. It is not an absolute right, but a natural one, qualified and limited, like all natural

rights, by the existence of like rights in others. It is incident merely to his ownership of land through which the stream has its course. As such owner he has the right to enjoy the continued flow of the stream, to use its force, and to make limited and temporary appropriation of its waters. These rights are held in common with all others having lands bordering upon the same stream; but his enjoyment must necessarily be according to his opportunity, prior to those below him, subsequent to those above. It follows that all such rights are liable to be modified and abridged in the enjoyment, by the exercise by others of their own rights; and, so far as they are thus abridged, the loss is *damnum absque injuria*. The only limit that can be set to this abridgment, through the exercise by others of their natural rights, is in the standard or measure of reasonable use. *Gould* vs. *Boston Duck Co.*, 13 Gray, 442; *Haskins* vs. *Haskins*, 9 Gray, 390; *Tourtellot* vs. *Phelps*, 4 Gray, 370–376; *Thurber* vs. *Martin*, 2 Gray, 394; *Pitts* vs. *Lancaster Mills*, 13 Met., 156; *Wadsworth* vs. *Tillotson*, 15 Conn., 366; *Springfield* vs. *Harris*, 4 Allen, 494.

So the natural right of the plaintiff to have the water descend to him in its pure state, fit to be used for the various purposes to which he may have occasion to apply it, must yield to the equal right in those who happen to be above him. Their use of the stream for mill purposes, for irrigation, watering cattle, and the manifold purposes for which they may lawfully use it, will tend to render the water more or less impure. Cultivating and fertilizing the lands bordering on the stream, and in which are its sources, their occupation by farm houses and other erections, will unavoidably cause impurities to be carried into the stream. As the lands are subdivided and their occupation and use become multifarious, these causes will be rendered more operative, and their effects more perceptible. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results only from reasonable use of the stream in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally and necessarily suffers still greater deterioration. Roads and streets crossing it, or running by its side, with their gutters and sluices discharging into it their surface water collected from over large spaces, and carrying with it in suspension the loose and light material that is thus swept off, are abundant sources of impurity, against which the law affords no redress by action. *Flagg* vs. *Worcester*, 13 Gray, 601; *Barry* vs. *Lowell*, 8 Allen, 127; *Turner* vs. *Dartmouth*, 13 Allen, 291. (110 Mass., 219-20.)

It will be observed that usages, customs and general acquiescence in the use of a stream for any particular purpose are among the controlling considerations in any given case as to what is reasonable use. The learned Judge who tried this case was forcibly impressed with the equitable circumstances shown by the evidence, and in stating the positions taken by counsel for the defendant, said:

> The customs, usages and practice of miners, which have universally prevailed, and which have everywhere been acquiesced in throughout the State ever since its organization, have sanctioned this use of the navigable streams, and in connection with the recognition and approval of the governments, both State and National, for a long series of years. Every one knowing the practice, and no one objecting, has changed the common law upon the subject—or at least that equitable circumstances exist which bind the consciences of both governments, and which cannot be disregarded by them.

Judge Temple then says:

> The equitable circumstances alluded to are manifest, and could hardly be too strongly stated. So great a calamity to so many people as would result from a judgment in this case, were it to be a precedent, has probably never been produced by any case in this country. And the acts which are said to be wrongful have certainly been so long tolerated, without objection, if they have not been encouraged, that no shadow of blame can possibly attach to those who have invested their money in it. If the question were in a legislative body whether some law which had permitted it, and under the sanction of which it had grown into importance, should be repealed, the suggestion would be irresistible. So it would in an action, perhaps, where it involved only the proprietary rights of the government, or any interest of the government simply considered in its corporate capacity. (Trans., fols. 224 to 226.)

These usages and customs so graphically stated by the learned Judge must be taken into consider-

ation in determining the question of reasonable use.

It has been well said that in determining upon the reasonableness of the use, it is necessary to take into account not only the general customs of the country, but also any local customs along the stream; and that such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes. (Cooley on Torts, 584.)

Chief Justice Shaw, in *Pitts* vs. *Lancaster Mills*, 13 Met., 158, says:

What is a reasonable use must depend on circumstances; such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts. (8 Met., 476.)

See also *City of Springfield* vs. *Harris*, 4 Allen, 494.

Snow vs. *Parsons*, 28 Vermont, 459, is also a leading case on reasonable use. It was an action to enjoin the defendant from throwing spent tan bark into a stream to the injury of a mill below. It appeared in evidence that it had been the uniform custom and practice to discharge spent bark into a stream in Vermont. Chief Justice Redfield, in delivering the opinion of the Court, says:

And upon the question of the reasonableness of the defendant's use of the stream, it seems to me the uniform custom of the country for generations, would be of some significance in determining its reasonableness. A uniform general custom upon this subject ought, upon general principles, to have a controlling force. * * In regard to the usage in the country as to tanneries, for generations, without controversy, if shown as offered to be, and if it is all one way, it would have almost the force of law. For all the cases which we have, where reasonable care and diligence can be determined as questions of law,

without going to the jury, have grown up out of the practice of particular classes of persons, which, becoming settled and uniform, and known to all, is declared by the Court as a rule of law; which, while it was uncertain, was matter of fact to be determined by the jury. * * * The measure of reasonable care and prudence in such cases, is that which prudent and careful men exercise in the management of their own business. And how are we to know this without proof, in those departments of business with which we are not familiar? Proof that all prudent and careful men, in the management of their business, pursued a given course, and that others aquiesced in that course, without objection, would seem to be of the very essence of the inquiry before the jury, in such cases. (28 Vt., 463–4.)

In *Gould* vs. *Boston Duck Co.*, 13 Gray, 452, Chief Justice Shaw said:

What is a reasonable use of water-power may often be a difficult question, depending upon a great variety of circumstances; somewhat upon usage, upon the state of mechanical and manufacturing advancement. Usage is some proof of what is considered a reasonable and proper use of that which is a common right, because it affords evidence of the tacit consent of all parties interested, to the general convenience of such use. (13 Gray, 452.)

And see also the case of *Red River Mills* vs. *Wright*, decided February, 1883, by the Supreme Court of Minnesota, reported 15 N. W. Rep., 167.

It is unnecessary to multiply authorities. It may be stated as a general rule, to which there are no exceptions, that in determining what is a reasonable use of water, the customs of the locality must be taken into consideration; and where such customs have been of long standing and universal observance, they have a controlling influence in establishing the reasonableness of the use.

The rules which would warrant an injunction in this case would deny any use of the streams for mining, and thus destroy the mining industries of the State.

If any miner can be enjoined without taking into consideration either the fact of whether or not his contribution to the deposits in the lower rivers and upon the adjacent lands is material, or the question of his right to the reasonable use of the stream for mining purposes, then all mining must cease.

It must be borne in mind that all gold mining in California is necessarily conducted by the use of water to separate the sand-rock and earthy material from the gold, and when that has been done the tailings are necessarily carried by the water into the streams.

If any mining is hereafter done, whether quartz, drift or hydraulic, the streams must be used as outlets for mining débris.

If the extent to which they may be used in the prosecution of this lawful industry does not depend upon the rule or measure of reasonable use, to be determined by all the circumstances, including custom and usage, how else can it be determined ?

Courts and juries must be governed by some such rule in determining what quantity of dêbris may lawfully be discharged into the stream from a ny particular mine.

We claim further, that there can be no injunction in this case if there be a reasonable doubt as to whether or not the defendant, by its own acts, has committed an actionable nuisance through an unreasonable use of its mining rights.

Indeed, it clearly appears from the evidence that the defendant has never, by its acts, directly deposited a single grain of sand in the navigable waters of the Sacramento river, and it is doubtful whether any appreciable amount of its débris has found its way so far from the north fork of the American river. The Court is unable to find that defendant has made any material contribution to the deposits in the Sacramento, and wholly fails to find that the defendant has made an unreasonable use of its mining rights.

In cases of nuisances, the injury must appear beyond a reasonable doubt, or equity will not interfere.

Ross vs. *Butler*, 19 N. J. Eq., 294.
Duncan vs. *Hayes*, 22 Id., 25.
Green vs. *Wilson*, 21 Id., 211.

VI.

Injuries to Private Lands of "Citizens of This State."

If the Court should hold that injuries to private lands constitute any part of plaintiff's cause of action, or if it shall consider such injuries in the case

at bar for any purpose, we then say, that so far as injuries to private lands are concerned, the defendant has the right to continue its mining operations, by reason of CUSTOM, PRESCRIPTION AND THE STATUTE OF LIMITATIONS.

If the persons whose lands are injured have no right of action, the State cannot complain, for in such case no nuisance, either public or private, exists.

CUSTOM.

The Court finds that the use of the streams in the mining regions, as common ways for outlets for mining débris, has been a universal custom; the only exception being where the beds of the streams had been previously occupied by a ditch or other work of that kind. It also finds that such use of the streams by mine owners, in most cases, is essential to the economical working of the mines. (Trans., fol. 173–4.) The phrase "in most cases" should have been omitted from this finding, for the evidence shows that *there is no other possible way of working the mines.*

The Court below finds that this practice is necessarily confined to mining localities, and has not been recognized or acquiesced in elsewhere, "*except that the waters of the streams throughout their entire course have been rendered turbid and foul, without complaint, until within the past few*

"*years.*" This exception makes the recognition and aquiescence universal; for the facts found are that the miners universally recognized and practiced the custom, and that the waters of the streams throughout their entire course have been rendered turbid and foul, without complaint, until within the last few years.

Where else, *except in the mining region and throughout the course of the streams*, was recognition or acquiescence necessary to establish the custom? It is not pretended that persons residing in other parts of the State objected, or had any occasion to object to the custom. The comments of the Judge, in his opinion upon this custom, are very instructive. (Trans., fols. 224–5–6.)

These comments, in connection with the finding, show the necessity, universality and equity of the custom.

The people of the valley and the farmers on these rivers not only acquiesced in the development of the mines, but encouraged it in every way in their power.

When the rivers were muddied by mining débris, and the banks were covered with sediment from the mines, no word of complaint came from the farmers on these rivers, because it was much more important to them that the mines should be worked than it was to have clear water along these streams.

The fact of universal acquiescence in a custom has been taken by the Courts in all cases as strong proof of its reasonableness; and when we know that mining was for a long time the paramount, and is now one of the most important interests in the State, and that it has been fostered and encouraged by the State and Federal Governments, with the consent and approval of every citizen in the State until this controversy arose, we must recognize the fact that this custom was established by universal consent, which almost conclusively shows that it is a reasonable custom; and when we consider the further fact that mining could not have been conducted without such a custom, it seems to be conclusively established that the custom is reasonable. The books furnish no instance of a custom more universal, more continuous or equally necessary; and no case can be cited where a custom possessing the elements of the one in question has been declared invalid.

The custom of using the natural water-courses as outlets for the working of placer gold mines was founded in necessity. No mode of placer mining for gold has ever been practiced that did not include the use of water to separate the gold from mining débris. Such débris is necessarily carried by the law of gravitation into the natural water-courses.

The North Fork of the American river, upon the water-shed of which the defendant's mine is situated, is emphatically an outlet for mining débris. It has been devoted almost exclusively to that purpose for its entire length. We find continuous mining, not only in the beds and on the banks of the streams, but on the hills and mountains and in the gulches throughout its entire water-shed. For 34 years all the placer mines and all the quartz mines on the water-shed of this river have discharged their débris so that it might flow down the river.

No objection to this custom can be urged on the ground that it is not necessary, or has not been universally recognized. If the working of the mines under this custom injured the agricultural lands below, such injury has been acquiesced in for over 30 years.

Neither the State nor the United States has undertaken to pass a code providing in detail for the working of mines, but each has assumed by its legislation that valid customs existed, and has recognized and confirmed the same.

In 1851 the Legislature of California passed the following Act:

> In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this State, must govern the decision of the action.

Code of Civil Procedure, sec. 748.

The Supreme Court said, in *Esmond* vs. *Chew*, 15 Cal., 137, in discussing the common right of miners to use the natural streams for an outlet to their mines, that

> The channel of the stream was the natural and necessary outlet for all; and no one had, as against the others, the right to its exclusive use for that purpose. (15 Cal., 243.)

See also

Gregory vs. *Harris*, 43 Cal., 38.

In *Bliss* vs. *Kingdom*, 46 Cal., 651, a local custom, authorizing a miner to construct a tunnel through an adjoining claim in order to work his own claim, was recognized as valid and binding.

Congress, by its various acts, has also recognized these customs as valid. The Supreme Court of the United States in its decisions has done the same.

Sparrow vs. *Strong*, 3 Wall., 97, was the first mining case from the Pacific States brought before the Supreme Court.

Chief Justice Chase, in delivering the opinion of the Court, said (p. 104):

> We know, also, that the Territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. We cannot shut our eyes to the public history, which informs us that under this legislation, and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country.

See also to the same effect:

Atchison vs. *Peterson*, 20 Wall., on pages 512 and 513.

Basey vs. *Gallagher*, 20 Wall., 670, on pages 681, 2 and 3.

Jennison vs. *Kirk*, 98 U. S., 453, on pages 458, 9 and 60.

Broder vs. *Water Co.*, 101 U. S., 274, on page 276.

The fact that the custom under consideration was not embodied in a written rule or regulation is immaterial. A custom established and in force will supersede a written regulation.

Harvey vs. *Ryan*, 42 Cal., 628.

North Noonday Co. vs. *Orient Co.*, 6 Saw., 299.

Jupiter Co. vs. *Bodie Co.*, 7 Saw., 96.

It is a mistake to say that no custom prevails applicable to the case under consideration. We do not pretend that there was ever a written regulation passed at any miners' meeting declaring that the water-courses were the natural and necessary outlets for the mines, and that the miners might use them in common for that purpose. No written regulation on that subject was necessary or proper. There was no other possible mode of working the mines. It would have been idle to adopt a written regulation on

that subject. As well might the miners have adopted regulations governing the law of gravitation.

Nor does it make any difference whether the custom is local or general. There is no reason why a local custom, observed in a particular locality, should have any more force or effect than a general custom observed and practiced by all the miners in all localities of the State. Such custom must be recognized as law wherever it is established and in force.

The whole system of mining law is predicated upon this custom.

Is it unreasonable, and therefore *invalid?*

It has been suggested that it is invalid because it is in violation of the Constitution of the United States. It is difficult to imagine what provision of the Constitution can be violated by this custom. It is true that States are prohibited from violating the obligation of contracts. There is no contract in question known to have been violated. Besides, there is no prohibition in the Constitution denying to the people of the State the right to establish customs by which their property rights may be affected and controlled.

The people among themselves may consent to many things which could not be done by the Legislature One of the most ordinary operations

of custom is to affect private rights, and in most cases in such a manner as they could not be directly affected by the Legislature.

It might as well be argued that the Statute of of Limitations is unconstitutional because it may operate to impair the obligation of contracts, and take away property rights. The Courts answer this objection by saying that the party himself loses his remedy by sleeping too long on his rights.

The objection, that under this custom private property is taken without compensation, must be abandoned. The very essence of a custom, whereby a right or easement is acquired upon land, involves the taking of private property.

See *Ivimey* vs. *Stocker*, 1 Law Rep. Ch. App., 403, where Lord Chancellor Cranworth said as to a mining custom of Cornwall:

> But for present purpose it is sufficient to say that by the custom of Cornwall, which I assume to be valid and well established wherever there are tin mines under waste lands, if the owner or lord of these lands does not think fit to work them, any person willing to do so may, complying with certain rules, mark off a definite plot of the waste land, and, without the consent of the owner, work the mines under it, yielding to him a certain proportion of the produce.

See also,

Snow vs. *Parsons*, 28 Vt., 462, *supra*.

The enumeration in the text books of the servitudes and easements that may be acquired by custom illustrates how and in what manner private property may be surrendered and acquired by custom.

Washburn on Easements says (p. 123):

> Among the instances of customary easements, as distinguished from those by prescription, which have been recognized as valid, are a right of way to a church, to dance upon a close for recreation, to dry or mend fishermen's nets upon a close, a right of way to a market, and a right to be quit of toll, a right to turn one's plow upon another's land, a right of a gateway or of a water-course, a right to take water from a spring or well in another's land for culinary and domestic purposes, a right to a public landing place to land upon and pass over, but not to occupy for storage of articles.

The use of private property exercised under the customs above enumerated, except for the custom, would be a trespass, which the Legislature could not authorize, except under the power of eminent domain.

The case of *Carlyon* vs. *Lovering*, 1 Hurlstone & Norman's Rep. Exch., p. 784, is precisely in point upon the custom under consideration.

Defendants were mining in the Stannaries of Cornwall, and used a stream running through plaintiff's land to wash out their mining débris; and in so doing the same filled up and raised the bed of the stream, causing it to overflow and deposit the débris on the plaintiff's land. The defendant's pleaded both prescription and custom.

The pleas were held good. The custom relied upon was held reasonable and valid, and the decision of the Court upon the plea of custom answers every objection made to the custom under consideration. The Court say (p. 799):

> The pleas founded on alleged custom admit of other considerations. The question is whether or not the custom as pleaded is good in law. It is settled that a custom to be valid in law

must be reasonable, certain and defined. It was objected that the custom as pleaded in the present case was unreasonable and indefinite, as the exercise of the custom might go to the destruction of the plaintiff's land adjoining the stream; that there was no limit to the user, as to times of user, or extent of user. No doubt, if that were so, the pleas would be bad; but we think they are not open to these objections. The exercise of the privilege as claimed was in respect of working a mine and winning the ore where the stream passed through the defendant's land. Thus the user is limited to the necessary working of the mine and the quantity of water sent down, although not expressly so alleged. The case of *Wilkes* vs. *Broadbent*, 1 Wilson, 63, Willes, 360, was pressed on us as a conclusive authority against these pleas. In that case the tenant of the lord of a manor justified under a custom to dig the mines and lay the rubbish on the surface in heaps upon the land near the pits, at the will and pleasure of the lord, and the alleged custom was held bad because it was uncertain. The words "*near to*" were of too great latitude. Secondly, because it laid too great burthen on plaintiff, and, being at the will of the lord, savors of arbitrary power. We do not think this custom open to these objections. It is not to take the land or any part of it, but merely to pollute the water of this stream in the course of working the mine. We do not see that this has a tendency to destroy the plaintiff's land or exclude the plaintiff from the use of his land, except to a partial extent. We think that the custom alleged is sufficiently definite, and is not unreasonable. It is possible more stuff from the mine may come down at one time than at another; but that does not show that the custom is bad. (See *Tyson* vs. *Smith*, 6 A. & E., 745). We think that as it is to be confined in user to the necessary working of the mine, etc., that the pleas are good and that there must be judgment for the defendants.

An examination of all the decisions as to custom will show that the custom here lacks no essential element. The only ground upon which it can be declared unreasonable is that it operates to the injury of property rights.

We have already seen that many customs have been upheld by the Court which produce such injury. This objection, therefore, is not a sufficient

reason for rejecting the custom. A careful examination of all the decisions wherein customs have been rejected as being unreasonable, will not show a single instance where the custom rejected *was founded upon necessity, or was essential to the exercise of a lawful industry.*

PRESCRIPTION.

The Defendant has Acquired a Prescriptive Right to Continue its Mining Operations as Against the Owners of the Private Lands Described in the Complaint.

The defendant and its predecessors have owned and worked the mine of the defendant for about 27 years, and have, during all that time, continuously discharged the tailings therefrom into the river, under a claim of right; and the Court finds that during the eight years previous to the commencement of this action, and up to the commencement thereof, the defendant had annually discharged the same amount of débris into the stream. The use of the stream by the defendant, as above stated, under a claim of right, *confers upon it a right by prescription to continue such use* as against the owners of private lands.

Prescription begins to run from the time an action would lie to recover damages for or prevent the exercise of the adverse right for which pre-

scription is claimed. In that, as in all other respects, prescription follows the analogy of the Statute of Limitations.

CONTINUOUS ADVERSE USE OF AN EASEMENT OR OTHER INCORPOREAL RIGHT, UNDER A CLAIM OF RIGHT, FOR THE PERIOD FIXED BY THE STATUTE OF LIMITATIONS AS A BAR TO THE RECOVERY OF LANDS HELD ADVERSELY, GIVES TO THE PERSON SO USING IT A FULL AND ABSOLUTE RIGHT TO THE EASEMENT OR OTHER RIGHT.

Tyler vs *Wilkinson*, 4 Mason, 397.
Tracy vs. *Atherton*, 36 Vt., 503.
Ward vs. *Warren*, 82 N. Y., 268.
Dana vs. *Valentine*, 5 Met., 8.
Jones vs. *Crow*, 32 Penn. St., 406.
Charity vs. *Riddle*, 14 F. C. (Scotch), 237.
Duncan vs. *Earl of Moray*, 15 Id., 302.
Goldsmid vs. *Tunbridge Wells Improvement Co.*, L. R., 1 Ch. App., 348.
Shreeve vs. *Voorhees*, 3 N. J. Eq., 32.
Bealey vs. *Shaw*, 6 East., 208.
Baxendale vs. *McMurray*, L. R. 2 Ch. App. 790.
Wright vs. *Williams*, 1 M. & W., 77.
Carlyon vs. *Lovering*, 1 H. & N., 784.
Bliss vs. *Hall*, 5 Scott, 500.
Crossley vs. *Lightowler*, L. R., 3 Eq. Cas., 296.

Tipping vs. *St. Helens Smelting Co.*, 4 B. & S., 608.

Stockport Water Works Co. vs. *Potter*, 7 H. & N., 160.

Rex vs. *Neville*, Peake, 125.

Dyer vs. *Depue*, 5 Whart., 584.

Crandall vs. *Woods*, 6 Cal., 450.

Union Water Co. vs. *Crary*, 25 Id., 509.

American Co. vs. *Bradford*, 27 Id., 360.

Davis vs. *Yale*, 32 Id. 26.

Grigsby vs. *Clear Lake Co.*, 40 Id., 396.

Campbell vs. *West*, 44 Id., 646.

Crane vs. *Crafts*, 53 Id., 135.

Washburn on Easements, 3d Ed., 114, side page 70.

3 Kent's Commentaries, star p. 442.

1 Greenleaf on Evidence, §§ 16 and 17.

Wood on Limitations, § 181, p. 376.

Wood on Nuisances, § 704.

Code of Civil Procedure, §§ 17, sub. 2, 312, 318, 319, 321, 343.

Civil Code, § 1007.

Tyler vs. *Wilkinson*, 4 Mason, 397, was a case involving the question of prescription for water rights. Mr. Justice Story, discussing this question, at page 401, says:

> Whoever seeks to found an exclusive use, [of water] must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from

all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a pre umption of right.

By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a *conclusive* presumption of a grant *or* right. I say of a grant OR right, for I very much doubt, whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant, is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law.

Tracy vs. *Atherton*, 36 Vt., 503, was a case involving a right of way claimed by adverse use. Chief Justice Poland, in delivering the judgment of the Court, at page 510, says :

We understand the case to have been submitted to the jury on this ground : that if the adverse use of the way began during the life of the plaintiff's father, or his grantor, and was continued for the period of fifteen years, without interruption, the right was acquired, though before the expiration of the fifteen years the land over which the way was used, descended to the plaintiff, who was an infant.

The question arises on the correctness of this instruction. The statute of limitations does not extend to these incorporeal rights, *but it has now become universally settled that an uninterrupted use of a way or other easement, under a claim of right, for the period of time fixed by the statute as a bar to the recovery of lands held adversely, gives to the person so using it a full and absolute right to such easement as much as if granted to him.* This has been settled by a long course of judicial decisions, and is founded primarily on the ancient doctrine of prescriptions, but has finally, by the courts been made to conform, by analogy to the statute of limitations applicable to lands, in all substantial particulars, so far as the difference in the subjects will allow.

The general language of the books, found in innumerable cases, is that from such a possession, continued for the period of the statute, the law will presume a grant, or courts will direct juries to presume a grant. But this is purely a legal fiction. *The doctrine proceeds wholly upon the ground of presuming a right after such length of possession, and not at all upon the ground that there ever was a grant made, but which has been lost, and though it may be shown ever so clearly that no grant was ever made, the case is not at all varied.* * * *

The true view of this subject is well stated by Wilde, J., in *Coolidge* vs. *Learned*, 8 Pick., 504. He says: "It has long been settled, that the *undisturbed enjoyment of an incorporeal right* affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury *a duty to presume a grant*, and in all cases juries are so instructed by the court. Not however, because either the court or jury believe the presumed grant to have been actually made, but because public policy and convenience require that long continued possession should not be disturbed."

In *Ward* vs. *Warren*, 82 N. Y., 268, a right of way, by prescription, was claimed. Judge Earl, speaking for the Court, says:

When the use of a way has, for the requisite time, been open, notorious, uninterrupted, undisputed, under claim of right and adverse, the law presumes a grant of such way from the owner of the servient tenement, *and such presumption is conclusive.*

Dana vs. *Valentine*, 5 Met., 8, was a bill in equity by ten plaintiffs, for an injunction to restrain the defendants from carrying on the business of slaughtering cattle, melting and trying out grease, and manufacturing tallow, soap and candles in the town of Cambridge. Six of the plaintiffs were lot owners, and four of them owned and occupied dwelling houses in the immediate neighborhood of the slaughterhouse and factory, and they alleged and proved that by reason of the defendants' works, the air on their lands and in their dwellings had been, and was, constantly impregnated with noisome, noxious and offensive vapors, fumes and stenches, and rendered corrupt, offensive and unwholesome, and that the lands of two of the plaintiffs had been overflowed with the feculent

matter from the slaughterhouse; that the health of the families of the plaintiffs who occupied their lots was greatly endangered, and they were constantly harassed, annoyed and their dwellings rendered unwholesome and unfit for habitation, and that their lots and property were rendered unsalable and of no value. The defendant pleaded use of his premises in the same business for more than twenty years, and claimed that he had acquired a prescriptive right to continue it there.

The Court denied the injunction on the ground that it appeared that the defendant might have acquired a prescriptive right to carry on his trade there.

Wilde, J., rendering the judgment of the Court, says:

The defence is, that the defendant, and those from whom he derives his title, have been in the possession of the buildings in which he carries on his trade, for more than twenty years, during which time he and they have carried on said trade without molestation or interruption, excepting for about two years, when the said buildings were not so used by them. This, *prima facie*, is a good foundation for the presumption of a grant, unless the said *non-user* is to be considered as breaking the continuity of the possession. The facts and circumstances in evidence are not sufficient to enable the court to give any decisive opinion on this point; but such as the evidence is, it is not sufficient to show any relinquishment or abandonment, by the persons under whom the defendant claims, of any of their privileges; and no interruption of their enjoyment of them by the plaintiffs is either proved or alleged. The mere ceasing to enjoy an easement does not destroy a party's right, unless it appears from the facts and circumstances that he intended to abandon and not resume it. * * * Another objection to the defendant's title by prescription is, that until *lately* the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interpose to prevent its continn

ance. But it is very clear that where a party's right of property is invaded, he may maintain an action for the invasion of his right, without proof of actual damage. So it was decided in *Bolivar Manuf. Co.* vs. *Neponset Manuf. Co.*, 16 Pick., 247, and the principle is unquestionable.

In *Charity* vs. *Riddle*, 14 F. C. (Scotch), 340, the defendant had, for more than twenty years, carried on in the suburbs of Glasgow, an establishment for the manufacture of glue, which emitted nauseous and offensive stenches. The defendant being about to enlarge his works, the plaintiff brought his petition for an interdict. It was held that by an unmolested, uninterrupted exercise of his trade in that locality for twenty years, the defendant had acquired a prescriptive right, as against the plaintiff, to continue it, but that he could not increase the nuisance by increasing the capacity of his works; and he was prohibited from enlarging them.

In *Duncan* vs. *Earl of Moray*, 15 F. C. (Scotch), 302, the defendant and others had for more than forty years been accustomed to collect in pits the *fuilze* from the sewage of Edinboro' that was discharged into the sea and found its way into the Foul Burn, and the matter thus collected was used for manure, and emitted noxious stenches that were very offensive. The plaintiff, who resided and owned property on the banks of the Foul Burn, in the vicinity of the defendant's pits, brought his action against him therefor. The

Court held that, as it appeared that these pits had existed for forty years and that the offensive smells therefrom were no more offensive than formerly, the defendant had acquired a prescriptive right to maintain them there.

Goldsmid vs. *Tunbridge Wells Improvement Co.*, L. R., 1 Ch. App., 348, was a case in which a stream passing through complainant's lands was polluted with sewage. Lord Justice Turner, delivering the judgment, said:

> It was suggested on the part of the plaintiff, that unless this Court interposed, a prescriptive right to discharge the sewage into the stream, to the prejudice of the plaintiff's estate, might be acquired by the defendants; to which it was answered on the part of the defendants, that such prescriptive right, if it could at all be acquired, had been already acquired by them. I am of opinion that the defendants have not acquired any such prescriptive right. *I assume, but without meaning to give any opinion upon the point, that such a right may well be acquired;* but then I think it could be acquired only by a continuance of the discharge of the sewage, prejudicially affecting the estate, at least to some extent, for the full period of twenty years, and I think the evidence sufficiently shows that the discharge has not prejudicially affected the estate for so long a period.

In *Bealey* vs. *Shaw*, 6 East., 208, it was assumed by counsel on both sides that a *user* of twenty years would give title, but as the defendant had enlarged his ditch and taken more water within twenty years, to the injury of the plaintiff, a lower riparian proprietor and mill owner, the question was whether his use during the period of prescription was the measure of his right. Lord

Ellenborough, in delivering judgment in that case, said:

I take it, that twenty years exclusive enjoyment of the water in any particular manner, affords a *conclusive presumption* of right in the party so enjoying it, derived from grant or act of parliament.

In *Rex* vs. *Neville*, Peake, 125, Lord Kenyon said:

Where manufactories have been borne with in a neighborhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time.

In *Bliss* vs. *Hall*, 5 Scott, 500, Park, J., said:

Twenty years' user would legalize the nuisance.

Sir John Leach, Vice-Chancellor, in *Wright* vs. *Howard*, 1 Sim. & Stuart, 190, said:

Every proprietor who claims a right either to throw the water back, above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, *or must prove an uninterrupted enjoyment of twenty years.*

In *Tipping* vs. *St. Helen's Smelting Co.*, 4 B. & S., 608, Mellor, J., in his charge to the jury, said:

Every man is bound to use his own property in such a manner as not to injure the property of his neighbor, *unless he has acquired a prescriptive right to do so.*

Bavendale vs. *McMurray*, L. R., 2 Ch. App., 790, was a case where a small river which flowed past the plaintiff's premises had been for more than twenty years polluted by the waste discharged from two paper mills on the river above.

For more than twenty years prior to 1861, rags had been used as the raw material, and had been treated with lime and alkali. In that year the defendant began to use a Spanish grass, called esparto, either alone or with rags, and to treat them with caustic soda. The amount of pollution remained practically the same.

Lord Cairns, then one of the Lords Justices, delivering the judgment, says:

> The question appears to me to be, what is the right or easement of the defendant? Is it a right, specific and defined, to pollute the stream by discharging the dirty water in which rags have been washed? Or is it a right to discharge into the river the refuse liquor and foul washings produced by the manufacture at his mills of paper in the reasonable and proper course of manufacture, using the materials which are proper for the purpose, but not increasing, as against the servient tenement, to any substantial or tangible degree, the amount of pollution.
>
> In my opinion, the right of the defendant would, upon the facts before us, be found, and be properly found by a jury to be the latter, and not the former right. * * * I am, therefore, of opinion that it is not sufficient for the plaintiff to show that the defendant uses, in the manufacture of paper, a raw material, different from that formerly employed. He must show, further, a greater amount of pollution and injury arising from the use of this new material, and the onus, of course, of showing this lies on the plaintiff.

In *Crossley* vs. *Lightowler*, L. R., 3 Eq. Cases, 296, the Vice-Chancellor, Sir W. Page Wood, recognizes the rule when he says:

> There is this point that the riparian proprietor has the right to the use of the water, whenever he may want to enjoy it, * * * and a right to interfere with anything that injures that right of user in such a manner as that, if not interrupted for twenty years, the person so injuring the right would acquire a title.

And again, in the same case, referring to the decision in *Bicket* vs. *Morris*, L. R., 1 H. L. (Scotch), 58, where it was held that a right of action accrued the very moment that there was an invasion of the right, and that a riparian proprietor must not wait till the damage was actually done and had become irreparable before he could maintain a suit for protection, he says the principle applies to the case before him, where the plaintiff says:

> I am at this moment not using the water for the purpose of watering cattle, or of wool washing, or for any other purpose; but it is, to a certain extent, clear and undefiled, and you are pouring in an immense quantity of foul water into the river in front of my property; therefore I seek to restrain that which in twenty years' time will become a right.

In *Stockport Water Works Co.* vs. *Potter*, 7 H. & N., 160, the plaintiff took water from the river Mersey for supplying the people of the town of Stockport, and sued to prevent the defendants, who had calico print works eleven miles higher up the river, from discharging arsenic from their works into the river. Analysis showed that at the point where plaintiff took its supply of water from the river, it contained six grains of arsenic to the gallon of water; yet, at the trial, one of the questions submitted to the jury was:

> Has the defendants' discharging matters into the stream occasioned injury to the plaintiffs in excess of the rights exercised by them for twenty years before the discharge of the matters complained of?

There the water supply of a town was poisoned, yet the Court assumes that, if the defendants had continuously for twenty years been poisoning it to the same extent, they had acquired the right to continue.

In *Wood* vs. *Waud*, 3 Exch., 748, the action was to enjoin the defendants, new comers, from adding pollution to a stream already so polluted by others as to render its waters unfit for ordinary uses. Pollock, C. B., said:

> This is a case therefore, of an injury to a right. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-works * * * and other sources of pollution above the plaintiffs, should be afterwards discontinued, the plaintiffs, who would otherwise have had in that case pure water, would be compellable to submit to this nuisance, which then would do a serious damage to them.

In *Flight* vs. *Thomas*, 10 A. & E., 590, Lord Denman said:

> There is no claim of an easement, *unless* you make it appear that the offensive smells had been used for twenty years to go over to the plaintiff's land.

In *Wright* vs. *Williams*, 1 Mees. & W., 77, it was held that a right to pollute water by letting off upon the neighboring land, water which had been used for the precipitation of minerals, and was thereby rendered noxious, was an easement and might be acquired like any other easement by adverse user.

In *Carlyon* vs. *Lovering*, 1 H. & N., 784, *supra*, it was held that a right to use a natural stream for the purpose of washing ores and carrying away sand, stone, rubbish, and other stuff dislodged and severed from the soil in the working of a mine, and to cause the stream to overflow its banks, might be acquired by *custom or prescription*, at common law or under Lord Tenterden's Act.

Mr. Washburn, at star page 70 of his work on Easements, after reviewing the cases, says :

It may, therefore, be stated as a general proposition of law, that if there has been an uninterrupted user and enjoyment of an easement, a stream of water for instance, in a particular way, for more than twenty-one, or twenty, or such other period of years as answers to the local period of limitation, it affords *conclusive presumption of right* in the party who shall have enjoyed it, provided such use and enjoyment be not by authority of law, or by or under some agreement between the owner of the inheritance and the party who shall have enjoyed it.

Chancellor Kent, in his Commentaries, Vol. 3, page 442, states the rule in this wise :

Though a stream be diminished in quantity, or corrupted in quality, by means of the exercise of certain trades, yet if the occupation of the party so taking or using it has existed for so long a time as to raise the presumption of a grant, and which presumption is the foundation of title by prescription, the other party whose land is below, must take the stream subject to such adverse right. * * * The general and established doctrine is, that an exclusive enjoyment of water, or of light, or of any other easement, in any particular way, for twenty years, or for such other period less than twenty years, which in any particular State is the established period of limitation, and enjoyed without interruption, becomes an adverse enjoyment sufficient to raise *a presumption of title* as against a right in any other person, which might have been, but was not asserted. * * * This presumption of title, founded on that enjoyment, is equally well established in the English and American law. To render the enjoyment of any easement for twenty years a

presumption *juris et de jure*, or conclusive evidence of right, it must have been continued, uninterrupted, or pacific, and adverse, that is, under a claim of right, with the *implied* acquiescence of the owner.

Mr. Greenleaf, in his work on Evidence, having said that the rules of the common law as to *conclusive* presumptions had been adopted "by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community, and therefore it is, that all corroborating evidence is dispensed with, and all opposing evidence is forbidden," says:

§ 16. By Statute. Sometimes this common consent is expressly declared, through the medium of the legislature, in *statutes*.

§ 17. *By the Common Law.* In other cases, the common consent, by which this class of legal presumptions is established, is declared through the medium of the judicial tribunals, it being the *common law* of the land; both being alike respected, as authoritative declarations of an imperative rule of law, against the operation of which no averment or evidence is received. Thus, the uninterrupted enjoyment of an incorporeal hereditament, for a period beyond the memory of man, is held to furnish a conclusive presumption of a prior grant of that, which has been so enjoyed. This is termed a title by prescription. *If this enjoyment has been not only uninterrupted, but exclusive and adverse in its character, for the period of twenty years, this also has been held, at common law, as a conclusive presumption of title.* There is no difference, in principle, whether the subject be a corporeal or an incorporeal hereditament; a grant of land may as well be presumed, as a grant of a fishery, or a common, or a way.

In Wood on Limitations, § 181, it is said:

While, as we have stated, each continuance of a nuisance is treated as a new nuisance, and furnishes a new ground of action which affords a good ground of recovery, although the statute may have run upon former injuries from the same nuisance, *yet this proposition only holds good when the action is brought before the person erecting or maintaining the nuisance has acquired a prescriptive right to do so, by the lapse of such a*

period as bars an entry npon lands adversely held by another, that being the period universally adopted in this country for the acquisition of prescriptive rights. It has been doubted, in at least one case, (*Campbell* vs. *Seaman*, 2 T. & C. [N. Y.], 240), whether a prescriptive right could be acquired to maintain a nuisance that merely polluted the atmosphere with offensive smells, or smoke and noxious or destructive vapors; but, regardless of this case, it may be said that according to the authorities such a right can be acquired.

Mr. Wood, in his work on Nuisances, says of this matter:

§ 704. PRESCRIPTIVE RIGHTS, ANCIENT AND MODERN RULE.—Much seeming confusion exists in the books upon the question as to whether a prescriptive right can be acquired to maintain all species of private nuisances, particularly such as corrupt the atmosphere with smoke, noxious vapors or noisome smells, or produce results injurious to health.

It becomes important, therefore, to understand what constitutes a prescriptive right, and how it is acquired. It is not necessary to give a minute detail of the distinction between the old and the modern doctrine of prescription; it is sufficient to say that the ancient rule, that the user must be for a period "beyond which the memory of man runneth not to the contrary," or in other words, for so long a period that the time when the user commenced could not be shown, has been discarded; and, under the new modern doctrine, it is sufficient to establish a user of twenty years; or rather, for such a period of time as is fixed by statute in the several States of this country, for the acquisition of titles to real estate by adverse enjoyment. Anciently, the doctrine rested upon the presumption of a conveyance by a lost deed; but now, a user for the statutory period raises the presumption of a grant, even though the use in its inception was an actual trespass.

The doctrine that prescription depends upon adverse user for the period prescribed by statute as a bar in real actions, was announced in *Crandall* vs. *Woods*, 6 Cal., 450, where Chief Justice Murray said:

It is urged by the respondents that they have acquired a right to the use of the stream in question, by adverse enjoyment or prescription. To acquire a title in this manner, it is necessary

that the enjoyment or prescription should have continued for a period corresponding to the time fixed by the Statute of Limitations as a bar to an entry on land. The period fixed by our statute is five years.

In *Union Water Co.* vs. *Crary*, 25 Cal., 509, the plaintiff had constructed two water ditches and appropriated the water of a mountain stream. Subsequently the defendant constructed his ditch, tapping the stream at a point above the heads of plaintiff's ditches, and claimed to have continued the use more than five years before action brought, and so to have the right by prescription to continue the use.

Judge Rhodes, delivering the opinion, says:

The right to the use of a water course in the public mineral lands, and the right to divert and use the water taken therefrom, is acquired by appropriation and user, the person first appropriating it being deemed to have the title, as against all the world, except the United States and persons claiming under them, to the extent that he thus appropriated it before the rights of others attached. The rights thus acquired may be held, granted, abandoned or lost by the same means as a right of the same character issuing out of the lands to which a private title exists. The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted and adverse enjoyment of the water-course, or of some certain portion of it, during the period limited by the Statute of Limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him.

In *American Co.* vs. *Bradford*, 27 Cal., 366, Judge Currey, speaking for the Court, says:

The general and established doctrine that an exclusive and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property or of the assumed right, held and enjoyed adversely, becomes

an adverse enjoyment sufficient to raise *a presumption of title as against a right in any other person which might have been, but was not asserted.* * * * An easement or servitude may be created by grant *or* prescription.

In *Davis* vs. *Yale*, 32 Cal., 26, the defendant pleaded and relied upon the Statute of Limitations, and asked the Court to instruct the jury:

If you find that the plaintiff's grantors originally took and appropriated *six* streams of water, and the defendant thereafter took and used five of such streams, *continuously and uninterruptedly, for a period of five years* prior to the commencement of this action, *with the knowledge of plaintiffs or their grantors*, in such case the defendant would acquire an absolute right to such five streams so taken and used by him, by virtue of the Statute of Limitations, notwithstanding the plaintiffs used their ditch and the remaining stream of water during said five years continuously, and the plaintiffs cannot recover such five streams in this action.

The trial Court refused to give the instruction.

Upon this question Judge Sanderson, in rendering the judgment of the Court, says:

There was testimony tending to show that the defendant had been in the adverse possession of the water of Mormon Creek, as against the plaintiffs and their grantors, to the capacity of his ditch, for more than five years prior to the commencement of the action, and the instruction asked by the defendant bearing upon the Statute of Limitations ought to have been given. Although the plaintiffs may have had the prior right; yet if they or their grantors *allowed the defendant to acquire and hold for five years adverse possession of the water* which they had appropriated, or any part thereof, they, to that extent, lost their right by force of the statute.

In *Grigsby* v. *Clear Lake Water Co.*, 40 Cal., 406, it was held that the defendant had not acquired a prescriptive right to flow plaintiff's land; for, say the Court:

To acquire this right, there must have been an uninterrupted enjoyment, under claim of right, for the period of five years. There must have been an actual occupation by the flow of

water, to the knowledge of the plaintiff, and such as to occasion damage and give him a right of action. There must have been such a use of the premises, and such damage, as will raise a presumption that plaintiff would not have submitted to it, unless the defendant had acquired a right so to use it.

In *Campbell* v. *West*, 44 Cal., 646, the plaintiff sued to abate a water ditch which the defendants had maintained for more than five years across lands owned by the plaintiff. The defendants *pleaded* the Statute of Limitations.

The Court say:

That the use commenced and continued up to the commencement of the action under a claim of right, and that it was peaceable, without interruption, open, notorious, and exclusive, and that it was maintained with the knowledge of the plaintiff and his grantors after they acquired the title, the evidence leaves but little doubt, and *justified* the Court in finding the adverse possession—or prescription, as it is usually denominated, when the issue relates to an easement.

And it was held that the finding upon that issue was decisive of the case.

The decision places the acquisition of title to an easement and to land by adverse possession upon exactly the same footing, as they should be.

One is as much within the meaning and purposes of our statute as the other.

The provisions of the Code of Civil Procedure are so plain that they leave little room for construction:

§ 17. The following words also have in this Code the signification attached to them in this section, unless otherwise apparent from the context.

2. The words "real property" are coextensive with lands, tenements and hereditaments.

§ 312. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is described by statute.

§ 318. No action for the recovery of *real property*, or for the recovery of the possession thereof, can be maintained, *unless it appear* that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the *property* in question, within five years before the commencement of the action.

§ 319. No cause of action, or defense to an action, *arising out of the title* to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action, or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor or grantor of such person, was seized or possessed of *the premises* in question within five years before the commencement [the commission?] of the act in respect to which such action is prosecuted or defense made.

§ 321. In every action for the recovery of *real property*, or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title, *unless it appear that the property* has been held and possessed adversely to such legal title, for five years before the commencement of the action.

By definition given in § 17, the language of §§ 318, 319 and 321, is made to include easements and servitudes as well as lands. Easements are hereditaments, and the plain intent of the Legislature was that the limitations fixed should apply to adverse possession of easements and of lands, in precisely the same way and with the same effect.

An action to enjoin the defendants from further pursuing their business of mining, because, as complainant alleges, it injures and is likely to injure him, is certainly a civil action, and, if so, is as certainly within the inhibition of § 312, that it could

only be commenced within the times limited by Title II. of that Code, unless a different time were specially fixed by some other statute.

If the limitations prescribed in §§ 318, 319 and 321 are not applicable to easements because they are not "real property" within the meaning of the definition of those words in § 17, then § 343 applies, for that section was intended to include every species of action not specifically provided for in that title or by some other statute. That section reads:

> § 343. An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

There can be no doubt, however, that it was the intention of the Legislature to place easements and servitudes upon the same footing as the lands themselves, and to make one uniform rule.

Prior to the adoption of the Codes, the Supreme Court had, in two well-considered cases (*Arrington* vs. *Liscom*, 34 Cal., 365, and *Cannon* vs. *Stockmon*, 36 Cal., 585) finally settled the rule in this State, that five years' adverse possession of land, with or without color of title, not only barred the right of the former owner to recover the possession, but created and vested in the adverse possessor a new and perfect title.

The statute declared only that the holder of the paper title should be barred of his remedy—

should not be allowed to maintain any action, at law or in equity, for recovery of the possession, but Sawyer, C. J., in delivering the opinion of the Court in *Arrington* vs. *Liscom*, 34 Cal., 385, said:

> Under our Statute of Limitations, a five years adverse possession covers all actions, and as effectually bars all rights of other claimants as a sixty years adverse possession under the common law. * * * The five years' adverse possession, practically, at least, is *conclusive* evidence of title in the possessor, and if conclusive evidence of title in him, it must be as conclusive evidence of no title in the other. * * * And the party who has acquired an absolute right of possession, which will not only shield him in the possession against the attacks of all the world, but, when ousted, will restore him to, and protect him in, his just possession, even against the party having the written title, would seem to have a substantial title.

Not only the remedy, but the title of the former owner was *extinguished*, and a new title created and vested. There is no word about the *presumption* of a grant by the former owner, which, by reason of his *laches*, he could not be allowed to contradict, but the decision is placed upon the only defensible ground that can be advanced in support of the rule of prescription or limitation—that it is for the best interest of the State that there should be an end to litigation and some certainty in titles—that it is a matter of *public policy*. It is the *policy* of the law, where the owner has allowed adverse possession of his land to be maintained by another, for the time limited, that his title and right should be thereby extinguished and another created. This is a plain and simple rule, and there is no reason why it should not be the

rule in cases involving easements as well as in cases involving lands.

In *Campbell* vs. *West*, 44 Cal., 646, and *Davis* vs. *Yale*, 32 Cal., 26, the Court seem to have considered the statute broad enough to cover easements without any necessity for the presumption of a grant, for in those cases the defendants relied upon the protection of the statute, and the Court held that the statute afforded complete protection.

Still the rule was not, by those cases, declared, in express terms, as it had been in *Arrington* vs. *Liscom* and *Cannon* vs. *Stockmon*, and it was important that it should be settled definitely by the statute, as it was, by declaring that the words "real property," when used in the sections of that Code fixing the limitation of actions, should be taken to embrace and include lands, tenements, *and* hereditaments, and by § 1007 of the Civil Code, which declares:

> § 1007. Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the *property confers* a title thereto, denominated a title by *prescription*, which is sufficient against all.

The word *property* here used is defined in § 14 to include real and personal property.

As between individuals, the time for the commencement of every kind of civil action is limited, and the longest period fixed is five years. It would seem, therefore, that the legislative purpose

to include under the provisions of the statute and within the rule stated in *Arrington* vs. *Liscom* and *Cannon* vs. *Stockmon*, easements as well as land could not be mistaken.

The character of the possession is precisely the same with respect to both.

For each of them it must be open, actual, continuous, exclusive, adverse, and under a claim of right, and with the knowledge and acquiescence of the owner.

It is not, in either, necessary that the adverse holder should, in words, signify his acquiescence. It is enough that the one has, without being interrupted or stopped, continued the use which was of such a character as to encroach upon and interfere with the rights of the other, and that the other, knowing of the use, or having the means of knowing, did not interrupt it, or commence and prosecute such legal proceedings as would interrupt it.

In *Ward* vs. *Warren*, 82 N. Y., 268, Earl, J., in delivering the judgment of the Court of Appeals, says:

> It is true that it is said in some of the text books and decided cases, that to constitute an easement by prescription, the *user* must have been for the requisite time "with the knowledge and acquiescence" of the owner of the servient tenement. (Washburn on Easements, 3d Ed., 160; 2 Washburn on Real Property, 300; *Blake* vs. *Everett*, 1 Allen, 248; *Carbrey* vs. *Willis*, 7 id., 368; *Colvin* vs. *Burnet*, 17 Wend., 568; *Parker* vs. *Foote*, 19 id., 309). But I apprehend, all that is meant by

the phrase quoted is that the *user* must have been not clandestine or by stealth, but open, notorious, visible and undisputed; and when such a *user* is under claim of right, adverse, the owner of the servient tenement is *charged with notice* thereof, and his *acquiescence is implied.*

In *Perrin* vs. *Garfield*, 37 Vt., 304, it was insisted that without *proof of notice* to the owners of the servient tenement, the *acquiescence* necessary to the acquirement of the easement could not be found, but the Court held that open, notorious possession, continuously maintained for the statutory period, was sufficient. Upon this point, the Court say:

The cases are rare and peculiar where proof of notice has been held necessary. The general current of authorities is the other way.

In *Smith* vs. *Kenrick*, 7 M. G. & S., 546, Maule, J., says:

As to surface flows, parties acquire rights to them because there is the acquiescence of everybody who has any interest in the matter. But as to underground percolations, no rights are gained, because nobody knows anything about them.

In *White* vs. *Chapin*, 12 Allen, 519, Foster, J., says:

Wherever there has been the use of an easement for twenty years, unexplained, *it will be presumed* to be under a claim of right and adverse, and be sufficient to establish a title by prescription and to authorize the presumption of a grant, unless controlled or explained; and it is incumbent upon the owner of the land to prove that the use of the easement was under some license, indulgence or special contract inconsistent with a claim of right by the other party.

In that case the plaintiff maintained a ditch through the defendant's land for draining his own land, for more than twenty years, and it was held

that such a use was of itself notice—that it was an open invasion of the rights of the owner, of which he must, at his peril, take notice and against which, if maintained without permission, he must take such proceedings as were necessary to protect his own rights.

Acquiescence can only mean that the party whose rights have been invaded, quietly looks on and does not resort to such acts or take such proceedings as will effectually put a stop to the invasion. The first act of invasion, as in the use of a way, or the cutting of a drain, or the pollution of water, or causing sediment to be deposited in the bed of a stream, is a trespass, and so, until the statute or prescription has fully run, and a right matured and vested by adverse user, the party whose rights are invaded has a right of action to stop it, and if it be of such a character as that he can personally interfere, as by erecting and maintaining a gate or fence across a way, or a dam across the drain or ditch where it enters his premises, has a right to stop it himself. But if knowing, or having the means of knowing, that his rights have been invaded, he looks on and does nothing, that is acquiescence. If not, then acquiescence in this use must mean an active consent or permission. Permission or consent upon request would negative an adverse holding, or a holding as of right.

In Rapalje & Lawrence's Law Dictionary we find this definition :

> ACQUIESCENCE.—Latin : *acquiesco*, to rest. Acquiescence is where a person who knows that he is entitled to impeach a transaction or *enforce a right*, neglects to do so for such a length of time that under the circumstances of the case the other party may fairly infer that he has waived or abandoned his right.

In some of the cases, English and American, it is said that the possession or user of the easement must be in all respects consistent with the *presumption* of a grant, and the moment it appears that it was not so held and used, as, if the owner of the land *objected, or* at some time declared that he did not approve of the use, the *presumption* was gone. The Judges who rendered such opinions must have felt that it was incumbent on them to be consistent, and as they had said and required jurors upon their oath to say that such rights, by reason of their long and quiet use, *must* have been granted, they must limit the presumption to the exact conditions of a grant. They would not allow the owner to show that no grant had in fact been made, but would allow him in a collateral way to attack the presumption by showing that some time *within* the period of prescription, he had remonstrated with the claimant against the use.

Lord Mansfield said the Court presumed the grant, not because the Court really thought a grant had been made, but as a matter of public

policy—to quiet possessions. That was the right ground and the only defensible ground, and hence it seems strange that any Court should have attempted to avoid the rule of policy by such flimsy subterfuges as that the owner, though he had done nothing to protect his right, had said that he did not consent to the invasion.

The English Commissioners called this presumption a "clumsy fiction," which some of the judges were not willing to declare as a presumption of law, but forced upon juries as a presumption of fact, to be found by them when it was absolutely certain that there was no foundation of fact for the presumption.

The rule, as stated by Judge Story in *Prescott* vs. *Nevers*, 4 Mas., 326, and by Chancellor Kent, in his Commentaries, is the only sensible rule—that when there has been an adverse enjoyment for the period of the statute, a title accrues, and the right thus secured is *juris et de jure*, and in no wise dependent upon the proverbially uncertain verdict of a jury. It does not at all depend upon any presumption of a grant, but only upon the fact of the particular and adverse use for the period which the law of the land, whether declared by the Legislature by statute or by the Courts as the common law, declares sufficient to toll the former owner's right of recovery, and to secure to the adverse user an absolute right of continuance and protec-

tion, which is, as was said in *Arrington* vs. *Liscom*, title. It is not a presumption of title—it is title, not the title of the former possessor transferred, but a new title created, and which in its creation blotted out the old title. Public policy and the best interests of society demand that, if the owner sees a stranger in possession of his land, or of any right or easement in, upon or over his land, he should promptly assert and enforce his right, and if he neglect to do so within the time prescribed, the stranger shall become the owner by virtue of his continued possession and enjoyment.

DOES PRESCRIPTION RUN AS AGAINST INJURIES TO PRIVATE RIGHTS RESULTING FROM A NUISANCE WHICH AT THE SAME TIME AFFECTS PUBLIC RIGHTS?

It has been suggested, that when a nuisance is both public and private; in other words, where it affects a public right, and in that aspect is a public nuisance, and at the same time injures private rights, and in that aspect is a private nuisance; that prescription will not run as against the injuries to private rights.

Whatever argument can be made in favor of such suggestion at common law, the Statute of Limitations of this State bars all actions for nuisances, *except public nuisances* AMOUNTING TO AN ACTUAL OBSTRUCTION OF PUBLIC RIGHT. So far as any nuisance affects, or may affect, rights, other

than *public* rights, it is subject to the Statute of Limitations.

All causes of action arising out of title to real property, or for injuries to the same, are expressly barred by the California Statute of Limitations.

Code of C. P., Secs. 319, 338, 343.

The limitations prescribed in this chapter apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions by private parties. (C. C. P., Sec. 345.)

The action at bar is barred by the statute, unless it falls within the following exception contained in the Civil Code:

"No lapse of time can legalize a public nui-
"sance, *amounting to an actual obstruction of pub-*
"*lic right.*" (C. C., 3490.)

The exception only extends to the public right, and by implication excludes all injuries to private rights. All causes of action for injuries to private rights from nuisances are therefore barred by the statute.

Hence it follows, *that by the law of this State*, no action can be maintained under the facts in this case, for injuries to private lands described in the complaint. Such injuries, as we have seen, do not amount to an actual obstruction of public right.

It is therefore unnecessary for us to discuss the rule on this subject at common law; but we are

satisfied that the rule established by our codes is in harmony with the rule existing at common law.

Judge Cooley is cited as authority for the position that prescription does not run as against injuries to *private* rights resulting from a nuisance which at the same time affects *public* rights.

But the citation made from Judge Cooley does not sustain this position. In his Law of Torts, he discusses the question whether or not the right to maintain a *public* nuisance against individuals suffering special and peculiar injury therefrom can be acquired by lapse of time. He says:

> It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the State. On the other hand, where a nuisance is *purely* private and concerns only the one person or the few who are injured, its maintenance for the period of prescription, without interruption, will bar any subsequent suit. There still remains the case of a public nuisance, not complained of by the State but by those to whom it works a special and peculiar injury; and whether the right to maintain it as against such persons can be gained by lapse of time *may possibly* be open to some question. It would seem plain that it could not be as against any one who had not personally been a sufferer from the nuisance for the whole period and while the nuisance was maintained without change. In other words, the prescription would run against individuals, and one could lose his action only because *he* had failed to complain, having had the whole period of prescription in which he was at liberty to do so. Therefore persons coming newly within the evil influence might complain when others could not. Moreover, if the injury was not constant, but could only arise occasionally, there would be no room for the application of the doctrine of prescription. Thus, if the nuisance consisted in an obstruction to navigation, no one could maintain a personal action until he had occasion to make use of the public right and found it obstructed; and his failing to bring suit for that particular injury would be a waiver only of such right of action as he then

had, but nothing more; and if another injury should be received more than twenty years subsequently, the fact that he had once abstained from bringing suit for a similar wrong could have no bearing whatever upon his right of action. And in any case of a public nuisance from which individual injury was received, it would seem anomalous—to say the least—that a portion of the sufferers should be at liberty to bring private suits and another portion not, or that a land owner who had long lived near it should be precluded, but might sell to another, who should come in with ample right. On the whole the better doctrine would seem to be, that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either when the State or when individuals claim them. (Cooley on Torts, 613–4.)

In support of the text, he refers to—

Folkes vs. *Chadd*, 3 Doug., 340; *Weld* vs. *Hornby*, 7 East., 195; *Simmons* vs. *Cornell*, 1 R. I., 519; *Knox* vs. *Chaloner*, 42 Me., 150; *Mills* vs. *Hall*, 9 Wend., 315; *Renwick* vs. *Morris*, 3 Hill, 621, S. C. 7 Hill, 575; *Kellogg* vs. *Thompson*, 66 N. Y., 88; *Veazie* vs. *Dwinel*, 50 Me., 479; *Lewis* vs. *Stein*, 16 Ala., 214; *Stoughton* vs. *Baker*, 4 Mass., 522; *Arundel* vs. *McCullough*, 10 Mass., 70.

To argue that this quotation is authority for the position that prescription will not run as against private rights, is to assume that Judge Cooley did not understand the distinction between public and private nuisances. The quotation, however, shows that the author had in mind the difference between a public nuisance—that which affects public rights, and a private nuisance—that which affects private rights; also the fact that a nuisance may at the same time affect public and private rights, and therefore be a public or a private nuisance, as we may consider the right affected.

So far as a nuisance affects private rights, it is *purely private*, and Judge Cooley says in the

above quotation that prescription applies to such a nuisance.

So far as a nuisance affects a public right, Judge Cooley inclines to the opinion that prescription will not run as against an individual suing for special injuries resulting to him from such nuisance. *The ground of such an action is the injury to plaintiff in his right to enjoy the public right infringed.*

The illustration given by Judge Cooley shows that he had this distinction in mind. He says:

> Thus if the nuisance consisted in an obstruction to navigation, no one could maintain a personal action until he had occasion to make use of the public right and found it obstructed.

No private individual could maintain an action for an obstruction to the navigation of the Sacramento river until he had occasion to use such public right and found it obstructed.

The fact that such private individual owned land on the bank of the river, which had been, or was being covered with dêbris, would give him no right of action concerning the navigation of the river. As Judge Cooley says, no cause of action for obstructing navigation would accrue to the individual until he had occasion to navigate the river and found it obstructed. But so far as his land is concerned, his right of action would accrue as soon as it was injured.

The right of action for depositing débris on land might be barred, still he could bring his action for obstructing navigation, when he had sought to use the public right of navigation and found it obstructed. So far as the public right of navigation is concerned, no length of time can legalize its obstruction, whether complaint is made by the State or by individuals specially injured; but so far as injuries to private rights are concerned, such as injuries to lands—which are not connected with, and do not in any way affect the public right of navigation—there certainly is no authority for saying that prescription does not run as against such private rights and injuries.

The cases cited by Judge Cooley hold that prescription does not run in favor of any nuisance obstructing a *public* right, but they do not sustain or involve the principle contended for by plaintiff's counsel—that prescription will not run in cases of nuisance as against injuries to *private* rights.

To show the misapplication of Judge Cooley's language, we will briefly review the cases cited by him.

In *Folkes* vs. *Chadd*, 3 Doug., 157 and 340, the plaintiff had constructed, and for more than twenty years maintained an embankment for the protection of certain meadow lands from being overflowed by the sea. The trustees for the protection

of the harbor of Wells thought that this embankment, by stopping back-water, contributed to the filling of the harbor, and threatened to cut it down.

He applied to the Court of Chancery for an injunction, and that Court directed that to determine the rights of the parties, the plaintiff should commence an action of trespass against the defendants—and that they must admit the trespass so as to present the single question whether the mischief to the harbor was a justification to the trustees for the cutting.

On the first appeal, p. 157, Lord Mansfield said:

> This case comes before the Court *under the same circumstances* as if it were an indictment for the continuance of a nuisance.

The embankment was clearly a public nuisance, if it contributed to the filling of the harbor; still, the plaintiff insisted that the embankment caused no injury, but if it did, that his twenty years' enjoyment gave the right to maintain the obstruction, and on the next trial his evidence upon that point was submitted to the jury. The verdict being against him, the case was again brought before the Court in banc, and a new trial denied.

In rendering judgment, Lord Mansfield says:

> The length of time is clearly not a bar, nor anything like a bar. It is a public nuisance, which may increase every hour, and it is nobody's business to prosecute.

In *Weld* vs. *Hornby*, 7 East, 195, the defendant's grantors had for a great number of years

maintained across the river Ribble, a brushwood weir, through which salmon and other fish were accustomed to pass to the plaintiff's fishing ground above. In 1776 the defendant constructed a solid stone weir, two-thirds across the river, and in 1784 removed the remaining third of the brushwood, and carried the stone weir quite across the river. This effectually stopped the passage of fish up the river. The plaintiff's action was commenced *within* twenty years after the building of the last third of the stone weir.

Sutton, B., before whom the case was tried, had instructed the jury:

> That if there had been an uninterrupted enjoyment of the weir in its *present* state for twenty years, this action could not be maintained; but that though less than twenty years did not of itself afford a conclusive presumption of right, yet that such a length of possession as has been shown by the defendant, and of the acquiescence on the part of the plaintiff, was certainly evidence of title, and connected with the other circumstances was evidence for them to say whether or not such a possession had a legal commencement, or was an encroachment on the plaintiff's right.

A verdict for the plaintiff was set aside because of this misdirection to the jury. On the hearing of the rule, Lord Ellenborough said:

> However twenty years acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing. *No objection however of this sort can apply to the present case*, where the action was commenced within twenty years after the complete extension of the stone weir across the river, by which it is proved that the plaintiff has been injured.

In *Simmons* vs. *Cornell*, 1 R. I., 519, the plaintiff had fenced in a public highway, and, after he had maintained his fence for more than twenty years, the defendant, as surveyor of highways and for the purpose of opening the road to the use of the public, tore the fence down. The plaintiff sued in trespass. It was held that he could not maintain the action, because the statute did not run against the public.

In *Knox* vs. *Chaloner*, 42 Me., 150, a dam had been maintained across a little stream capable of floating logs, for more than twenty years. The plaintiff in the action attempted to float logs down this stream, and was obliged to haul them around the dam. He sued, in case, for the damage caused to him by the obstruction. In that State, brooks which, in a flood, will float logs, are declared navigable streams and public highways.

In that case it was held that—

A dam which impedes or obstructs the right of the public, in floating boats or logs in a stream in which they can be floated in its natural state, must, for the same reasons, be held *pro tanto* a nuisance.

The obstruction was to a public highway. The plaintiff, in attempting to use it for the *first* time, was specially injured by it, and the case only decides that as to him, there was no prescription.

Mills vs. *Hall*, 9 Wend., 315, was an action on the case for nuisance, created by the erection and

maintenance of a dam across the outlet of Lake Paradox. The case showed that the dam had been built in 1825 or 1826, on a site where there had been a dam since 1806 or 1807, and that subsequent to the rebuilding, the fever and ague had become more common in that section than before, and it was submitted to the jury whether this was attributable to the rebuilding of this dam or to other dams on tributaries of the lake which brought down large quantities of sawdust into the lake. The case was heard in the Supreme Court in 1832, less than ten years from the rebuilding of the dam and from the increased prevalence of the fever complained of. The jury found a verdict for the plaintiff, and that verdict was sustained on appeal.

Sutherland, J., says, *arguendo*:

> Admitting that the defendants' dam has been erected and maintained more than twenty years, and that during the whole of that period it has rendered the adjacent country unhealthy, such length of time can be no defense to a proceeding on the part of the public to abate it, *or to an action by any individual for the special and peculiar injury which he may have suffered from it.* 8 Cow., 152, 3; 4 Wend., 9, 25..

But the question as to prescription against individuals did not arise in that case, because the sickness complained of was within the time of prescription, and neither of the cases cited announce any such doctrine. Both references are to the case of *Lansing* vs. *Smith*, in Supreme Court, 8

Cow., 146, 152–3, and in Court of Errors, 4 Wend., 9, 25, and the question of prescription was not raised or discussed in either Court.

Renwick vs. *Morris*, 3 Hill, 621, in Supreme Court, and 7 Hill, 575, in the Court of Errors, was trespass for tearing away a portion of a dam across the Harlem river, a navigable stream.

A statute had authorized the construction of a dam, but required that it shonld be so constructed as to admit the passage of such vessels as were accustomed to navigate the river.

The dam, as built and maintained for more than twenty years, did not admit the passage of any vessels, and the defendants tore away so much as was necessary to allow their vessel to pass through.

It was held in both Courts that, in so far as the dam exceeded the authorization of the statute, it was a public nuisance, that lapse of time would not bar an indictment to abate it; and if so, that any individual might abate it *as* a public nuisance.

Kellogg vs. *Thompson*, 66 N. Y., 88, was an action for damages commenced in 1873, against commissioners and an overseer of highways, for turning a small stream of water from an artificial channel by the side of the track of a public highway, upon the adjoining lands of the plaintiff.

The case showed that prior to 1850, the stream in question, crossed the highway from the south, by a sluice, to the plaintiff's land, and thence passing over plaintiff's land for some distance in a northerly course turned, and through another sluice, about seventy rods distant from the first one, recrossed the highway. In 1850, the plaintiff made an artificial channel from the first sluice for ten or fifteen rods along the north side of the roadway, and thence over his own land in a straight course to meet the original channel near to the second sluice.

In 1864, the plaintiff being then overseer of highways, extended the artificial channel along the north side of the roadway and within the limits of the highway, until it intersected the original stream, and at the same time filled up the artificial channel on his own land. He also dug another channel along the south side of the roadway, to within a few feet of the first sluice, and diminished the capacity of the sluice, so that the water cut through to the new channel, and for several years flowed on the south side. In 1873, the defendants, as public officers, turned the stream into its original channel.

Church, C. J., having stated the facts, says:

It will thus be seen that the plaintiff's land has not been relieved of the water for twenty years, but only nine years, from 1864 to 1873. In 1864 it was turned on by the plaintiff ostensibly on the north side, but substantially and evidently by de-

sign on the south side, without right or authority. As an overseer of highways he had no right thus to disencumber his own premises at the expense of the public, who could at any time since have turned it back where it belonged, either into the original bed, or the artificial channel on the plaintiff's land. The stream became a public nuisance in obstructing the highway, and it was the right and duty of the public officers to abate it, and they had the right to restore it to its original channel, especially as the plaintiff had filled up the artificial channel on his own land, and if the original channel had become filled up (which is not found) it was the plaintiff's fault, and he cannot complain. He having turned the stream into the highway without legal authority or right, cannot object to its restoration. But if twenty years had elapsed, I am not prepared to assent to the position that a prescriptive right could be thus acquired *against the public.*

Although unnecessary to decide the question, it is proper to disclaim any intention to affirm such a doctrine.

Veazie vs. *Dwinel*, 50 Me., 479, was a controversy between two mill owners on the Penobscot River above the reach of tides, but where the river was what is in that State called *floatable*, and so a public highway. On such streams, mill owners are there required to provide suitable sluice-ways for the passage of logs and rafts through their dams. Dwinel, the owner of the lower mill, had provided and maintained such a sluice-way through his dam, but the sluice-way and the rafting channel through the pond had been considerably obstructed by slabs and refuse thrown in from the upper mill within a period of less than ten years.

Veazie made a claim of prescriptive right, but the Court say that, as against the public, prescription will not run, and that, as against Dwinel, he had not acquired a prescriptive right; for, say the Court:

It appears that for many years, there was a sluice or waste-way through Dwinel's dam, which was used by the owners of that dam to discharge waste and other materials from their mill pond, and through which, at high stages of water, slabs and waste from Veazie's mill also passed. But there was *no evidence tending to show* that the owners or occupants of Veazie's mills *ever claimed the right* to control or use that sluice for such purpose, or, in fact, ever exercised such control.

Lewis vs. *Stein*, 16 Ala., 214, was an action to recover a statutory penalty for fouling a small stream from which water for the City of Mobile was obtained, with sawdust from the defendant's mill, which had been built and in use more than twenty years.

It was held that, if a right to continue any nuisance could be acquired by a lapse of time, which the Court seemed to doubt, it must be on the presumption of a grant, and that in the case before the Court no presumption could be indulged, because the Act, under which the prosecution was made, imposed a penalty on any one who should foul or injure the waters of that creek.

In *Stoughton* vs. *Baker*, 4 Mass., 522, the case shows that the town of Dorchester, in 1633, granted to *Israel Stoughton*, grantor of defendants, the right to build a water mill on Neponset River, and by a separate grant, also granted to him a several fishery below his mill. No fishway through or around the dam was made until 1789, when, under a resolution of the General Court, one was made at the expense of two of the three towns,

plaintiffs in the action. In 1805, the Legislature appointed three commissioners, and gave them authority to order such alterations in fishways already made, or to make new fishways around the dams on that river as, in their opinion, should be sufficient for the passage of shad and alewives up the river; and that three-fourths of the expense be paid by the owners of the dams and one-fourth by the three towns.

Alterations were ordered by the committee in the fishway at defendant's dam, and the action was for three-fourths of the expense. The defense was that he held the mill and dam, and a free fishery below his mill, by an ancient grant which did not require fishways, and that it was not competent for the Legislature to impose any new conditions or burdens.

Chief Justice Parsons, in rendering judgment, said:

> But the right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights, by compelling him to make compensation to the owners of land above, for, and damages occasioned by, overflowing their lands; another was to protect the rights of the public to the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage-way shall be allowed for the fish. This limitation, being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to comply with it. For no laches can be imputed to the Government, and against it no time runs so as to bar its rights.

And it was held that the law, placing the matter under direction of the three commissioners, was constitutional. That is all that is shown by that case in regard to prescription.

In *Arundel* vs. *McCullough*, 10 Mass., 70, the town of Arundel had, without legislative authority, built a bridge without a draw across the Kennebunk River, a stream navigable above and below the bridge, and had maintained it for more than fifty years. A vessel had been built for the defendant at some point above the bridge, and he removed the bridge to enable him to get his vessel down the river. The town sued in trespass:

The Court say:

> The only claim of a right to continue the bridge rests upon the antiquity of the bridge, and the laying out of a road over the river in the year 1771. But we think that neither of these facts sanctioned the obstruction of the river, so as to prevent those who had occasion to transport vessels up and down from removing it, if necessary to a safe and convenient passage. Public rights cannot be destroyed by long-continued encroachments; at least, the party who claims the exercise of any right inconsistent with the free enjoyment of a public easement or privilege, must put himself upon the ground of prescription, unless he has a grant or some valid authority from the Government; and a right by prescription does not exist in the present case. * * * It is clear that when any public way is unlawfully obstructed, any individual, who wants to use it in a lawful way, may remove the obstruction. * * * Here nothing more was done than was necessary to procure a safe passage for the defendant's vessel, and we are satisfied that no trespass was thereby committed by him.

These are all the cases cited by Judge Cooley. None of them involve the principle that prescrip-

tion will not run as against private rights; and Judge Cooley certainly did not cite these cases to sustain any such principle.

If there could be any doubt as to the result of the authorities generally, we must conclude that the Statute of Limitations of California bars every right of action concerning nuisances in the period prescribed, except that the *actual obstruction of a public right* cannot be legalized by lapse of time; hence it must follow that the owners of lands adjacent to the rivers of this State upon the facts appearing in the record have no right of action against the defendant by reason of injury to such lands; nor has the State any right of action for such injuries, *because no public right is affected or obstructed thereby.*

Condemnation.

By Subdivision 5 of Sec. 1238 of the Code of Civil Procedure, as we have already seen, defendant and other miners had a right to condemn the necessary private lands for the flow and deposit of mining débris. The defendant having conducted its mining operations continuously for more than the statutory period of limitations, it must be presumed, in the absence of proof to the

contrary, that all places used in common for the deposit of mining débris have been condemned for that purpose.

The use of property, where the right of condemnation exists, for the statutory period of limitations, is equivalent to judicial condemnation. The owner of the property taken loses his remedy for compensation, unless the same is enforced within the statutory period.

Williams vs. *Nelson*, 23 Pick., 141, is directly in point on this question, and covers all our contention. See also,

Bumpus vs. *Miller*, 4 Mich., 159 and 163.
Harper vs. *Richardson*, 22 Cal., 253.
Potter vs. *Ames*, 43 Cal., 78.
Goddard vs. *Boston*, 20 Pick., 407 and 410.
McClinton vs. *R. R. Co.*, 66 Penn. St., 406.
Lord vs. *Morris*, 18 Cal., 485.
Hardy vs. *Harbin*, 4 Saw., 548–9.

VII.

Equitable Considerations.

The learned judge who rendered the opinion in the Court below well remarked, that

> The equitable circumstances in this case cannot be too strongly stated. So great a calamity to so many people as would result from a judgment in this case, were it to be a precedent, has probably never been produced in any case in this country; and the acts which are said to be wrongful have

certainly been so long tolerated without objection, if they have not been encouraged, that no shadow of blame can possibly attach to those who have invested their money in it.

These equitable circumstances must be disregarded before an injunction can be sustained against the defendant.

Great caution must be exercised in interfering with great industries which tend to promote the public good, and in such cases it will not suffice to show a probable or contingent injury, but it must be shown to be inevitable and undoubted.

1 High on Injunctions., 787.

Courts of Equity, where the State is a party, will grant an injunction to restrain a public nuisance only in cases where the fact is clearly made out upon determinate and satisfactory evidence. For, if the evidence be conflicting and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition.

2 Story's Eq. Juris., 5 Ed., Sec. 924[a].

A public nuisance must be established by clear evidence before the preventive remedy will be granted.

3 Pomeroy's Eq. Juris., Sec. 1349, and cases cited in note 5.

It makes no difference, in considering the equitable circumstances, that the State is a party, and the nuisance is alleged to be public.

In the case of *Easton and McMahon* vs. *New York and Long Branch R. R.*, 24 N. J. Eq., 49, in speaking of delays and other equitable circumstances, the Court said (p. 58):

> The public, as represented by the attorney-general, stand in no better position than the relators, and are bound by the like rules. Though a stronger case of delay is required to affect those who assert a public right, than where a private right alone is in dispute, delay, even in such cases, is not without effect.

Attorney-General vs. *Gas Consumers' Co.*, 3 De Gex. M. & G., 340.

See also

Attorney-General vs. *Delaware R. R. Co.*, 27 N. J. Eq., 3.

However strong a case of delay is required to prevent an injunction on behalf of the State, the bar is stronger than any other that has been, or case at will ever again be presented. We have not only delay, but encouragement, acquiescence and express legislative recognition.

Over thirty years of such delay, acquiescence and encouragement by both the Government of the United States and of the State, and all the people of the State, place the equitable circumstances of this case in the strongest possible light.

Well might the learned Judge say that these equitable circumstances could not be too strongly stated.

We have examined a large number of cases where injunctions were denied by reason of delay and other equitable circumstances, and fail to find one where the equitable circumstances against the granting of an injunction can be compared to those of the case at bar, either in the extent of the delay, the abundant evidence of acquiescence and encouragement, the legislative recognition, or in any one of the leading circumstances for which Courts of Equity deny this extraordinary relief.

Each case has its peculiar features, and the equitable features in this case are so marked and distinctive as to place the right of the defendant to continue its mining operations as it heretofore has done beyond all reasonable question.

Courts of equity refuse to interfere when there has been gross laches in prosecuting rights, or unreasonable acquiescence in the assertion of adverse rights. (2 Story's Eq., Sec. 1520.)

The foregoing proposition of law cannot be questioned. The only questions that can arise in any given case are, "Have the laches been gross "in prosecuting rights?" or, "has the acquiescence "been unreasonable?"

It is unnecessary to examine the cases in detail for the purposes of the case at bar.

No laches can be more gross than delay for thirty-four years, a period longer than the existence of the State government. Nor can any acquiescence be more unreasonable than in not only failing to object during all that time, but, on the contrary, encouraging the very acts complained of, until vast property interests have grown up, and fifteen counties, with over 100,000 population, are chiefly dependent upon such interests.

The remarks of Lord Camden, in *Smith* vs. *Clay*, 6 Bro. Ch. 639, have been universally quoted and approved by jurists. He said:

> A Court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive and does nothing.

Edwards vs. *Allouez M. Co.*, 38 Mich., 46, S. C. 31 Am. Rep., 301.

Bassett vs. *Salisbury Co.*, 47 N. H., 426.

Gilbert vs. *Showerman*, 23 Mich., 449.

Goodall vs. *Crofton*, 33 Ohio St., 271, S. C. 31 Am. Rep., 535.

High on Injunctions, Vol. 1, Sec. 786.

Dana vs. *Valentine*, 5 Met., 8.

Parker vs. *Winnipiseogee Co.*, 2 Black, 545.

Pomeroy's Eq. Juris., Vol. 1, p. 459.

Tichner vs. *Wilson*, 4 Halst. Ch., 197.

Grey vs. *Ohio R. R. Co.*, 1 Grant cas., 412.
Lady Stanley of Alderley vs. *Earl of Shrewsbury*, L. R. 19 Eq. cas., 616, S. C. 13 Moak's English Rep., 546.
Binney's case, 2 Bland. Ch. (Md.), 99–103.
Reid vs. *Gifford*, 6 Johns. Ch., 19.
Peabody vs. *Flint*, 6 Allen, 57.
Fuller vs. *Melrose*, 1 Allen, 166.
Tash vs. *Adams*, 10 Cush., 252.
Piatt vs. *Vattier*, 9 Peters, 416.
Goodin vs. *Cin. Canal Co.*, 18 Ohio St., 169.

VIII.

CONCLUSION.

In conclusion, we ask the Court to take into consideration the public history of gold mining in this State.

When gold was discovered on the American river in 1848, this remote and recently acquired Territory was a *terra incognita* to the people of the United States. This discovery brought an unparalleled immigration to California. Not less than two hundred thousand people, within three years, were located in the mining counties of this State, and one hundred thousand still remain.

Mining brought into existence civilization, and organized States and Territories on the Pacific

Coast at least 50 years earlier than would have been possible but for the discovery of gold.

Mining for the precious metals was a new industry to the people of the United States. They had no laws applicable to the wants and necessities of miners. The title to the lands was in the United States, and it neglected, for the period of eighteen years, to pass any law with regard to mining. The miners themselves, from the necessities of the case, made rules and regulations for their own government, as to the extent and manner of holding mining claims, and the use of water for mining purposes. These rules and regulations were sanctioned by the State Legislature, and moulded into a system of law by the decisions of the Courts.

When Congress acted upon the subject, it ratified and confirmed all that the miners had done. The Supreme Court of the United States has since frequently held that this confirmation of the rules, regulations and customs of miners legalized the same from their inception, so far as the United States was affected thereby.

The State Legislature has encouraged mining in every possible way. Many laws have been enacted for the benefit of the miners, while none have ever been passed to limit their privileges or restrict their operations.

The use of the streams as outlets for the mines is a *necessity*.

By the exercise of that right, twelve hundred millions of gold have been extracted from the mines of California, nine hundred millions of which came from the ancient water channels in which defendant's mine is situated, and there is much more gold still remaining than the amount already extracted. (Transcript, fol. 177–8).

One hundred and fifty millions of capital is now invested in mines in California, one hundred millions of which is invested in hydraulic mines.

If the principle contended for by plaintiff's counsel in this case is established by the Courts, whereby every miner can be enjoined who discharges débris into the stream, whether the amount so discharged materially contributes to the evil complained of or not, all mining, drift, quartz and hydraulic, must cease. The inevitable result of such a rule would be to lock up forever the vast mineral resources of the State, and destroy the principal industry of fifteen counties, with a population of over 100,000 people.

There has been no change in the mode of mining causing any new exigency, or warranting this proceeding. Hydraulic mining, as now practiced, does not increase the amount of material discharged into the stream. On the contrary, the amount so

discharged has been diminishing during the last eight years. (Transcript, fol. 178–9).

This action is not authorized by any statute of the State.

The Attorney-General, on his own motion, has assumed to reverse the policy of the State and to declare the prosecution of one of its principal and fostered industries, a crime against the people of the State. When asked by what authority he does this, he replies by asserting powers analogous to the powers exercised by the Attorney-General of the Crown of Great Britain. When asked to produce authority for such analogy in the laws, customs and decisions of the Courts of this State, he fails to find a precedent for his unparalleled assumption.

When called upon for a similar case to this in England, where the Attorney-General reversed the policy of Parliament, and the customs and usages of the country, by declaring a great industry a nuisance, he remains silent.

We do not deny the police power of the State; but that power must be exercised by the Legislature—not by the Attorney-General or the Courts.

Whenever the Legislature deems it proper for the public good, it may authorize actions of this kind, and pass any other necessary laws. But the Legislature has not done this. It has witnessed

the acts complained of for the last thirty-four years, and encouraged the same, and we deny the right of the Attorney-General to bring into requisition the police power while the Legislature remains silent. And we submit that a Court of Equity, which is always cautious in entertaining jurisdiction in any case of public nuisance, ought not to entertain this action, but leave the State to its remedy by information and indictment, which is plain, speedy and adequate. Let the Attorney-General prosecute the defendant in a Criminal Court, where there will be no question about his right to appear, and no question about the right of the defendant to be tried by a jury.

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Service of within Brief accepted by copy, this

27th *day of March, 1884.*

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